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In The

Supreme Court of the United States

October Term, 1992

BMW OF NORTH AMERICA, INC.,
Petitioner,

vs.

BIG APPLE BMW, INC., POTAMKIN BMW AND VW, INC., ROBERT POTAMKIN and ALAN POTAMKIN,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Third Circuit's decision reversing summary judgment in this "refusal to deal" case raises two fundamental antitrust issues which merit review by this Court:

1. Whether evidence merely challenging a manufacturer's stated business reasons for refusing to deal with a potential distributor is sufficient as the necessary supplemental evidence, in addition to complaints, required under *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U. S . 752 (1984), to reasonably tend to prove that the manufacturer and existing distributors had an unlawful agreement under Section 1 of the Sherman Act.

2 . Whether a finding of a " further agreement on the price or price levels to be charged" by the existing dealers, as required by *Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717, 726 (1988) , can be premised solely upon (i) the sharing of retail price statistics between manufacturer and distributor and (ii) the setting by distributors of a collective advertising budget on a per item basis, both of which are standard industry practices.

PARTIES TO THE PROCEEDINGS

The caption of this petition identifies all parties in the lower court. The parent company of BMW of North America, Inc. is BMW (U.S.) Holding Corp., which is, in turn, owned by Bayerische Motoren Werke, A.G. BMW NA's only subsidiary which is not wholly owned is BMW Credit Corp.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully requests that a writ of certiorari be issued to review the decision of the United States Court of Appeals for the Third Circuit, entered on August 6, 1992.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 974 F.2d

1358 (3d Cir. 1992), and is set forth in Appendix A hereto at 1a.[1] The opinion of the District Court is not published, and is set forth in Appendix B hereto, App. at 79a.

STATEMENT OF JURISDICTION

A. The Petition is timely filed within ninety (90) days of the September 2, 1992 order of the Court of Appeals denying petitioner's petition for rehearing. The order denying rehearing is set forth in Appendix C hereto, App. at 95a.

B. The opinion of the Court of Appeals, entered on August 6, 1992, reversed an order of the District Court for the Eastern District of Pennsylvania, entered on November 15, 1990, which granted petitioner's motion for summary judgment on all claims in the complaint except Count II, including the claim brought under the Sherman Antitrust Act, 15 U.S.C. § 1, *et seq.* The Court of Appeals had jurisdiction pursuant to the final order granting partial summary judgment and entry of such order as a final judgment under Federal Rule of Civil Procedure 54(b).

C. The jurisdiction of this Court is conferred by 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 1 of the Sherman Antitrust Act, 15 U.S.C. § 1, provides in relevant part as follows:

> **§ 1 Trusts, etc., in restraint of trade illegal; penalty**

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1. References to the Appendix to this Petition are cited herein as "App. at __a." Reference to the Joint and Consolidated Appendix filed in the Court of Appeals are cited as "A__."

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.

The Pennsylvania Board of Vehicles Act, 63 Pa. Stat. Ann. § 818.1, *et seq.*, provides in relevant part as follows:

> **§ 818.9(b). Additional unlawful acts of manufacturers**
>
> It shall be a violation of this act for any manufacturer, factory branch or distributor licensed under this act to:
>
> * * *
>
> (3) Unreasonably withhold consent to the sale, transfer or exchange of the franchise to a qualified buyer capable of being licensed as a new vehicle dealer in this Commonwealth.

STATEMENT OF THE CASE

This case concerns BMW of North America, Inc.'s ("BMW NA's") decisions not to grant respondents BMW automobile dealerships in Philadelphia and Manhattan in 1985. In their complaint, respondents alleged that BMW NA unreasonably refused to approve their Philadelphia dealership application and wrongfully interfered with their attempt to acquire a dealership in Manhattan pursuant to a conspiracy between BMW NA and BMW dealers to fix prices for BMW automobiles. A14-34. The complaint alleged a *per se* violation of Section 1 of the Sherman Act. After extensive discovery, the District Court granted summary judgment to BMW NA.

In overturning the District Court's decision, the Third Circuit relied on evidence that BMW NA's reasons for rejecting the respondents were pretextual. This evidence, coupled with evidence of complaints, was found sufficient to warrant reversal. Judge Roth vigorously dissented from this conclusion. The Third Circuit's position conflicts with the position of at least three other circuits which have held that such evidence of "pretext" is not probative of a conspiracy.

In addition, the Third Circuit found sufficient evidence of an agreement between BMW NA and its dealers as to the price levels to be charged by the dealers, as required by *Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717, 726 (1988), based on the routine types of "communication about prices and marketing strategy" that are both standard industry practice and expressly found to be alone insufficient to support an inference of concerted action under this Court's decision in *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 762 (1984).

This petition seeks review of the Third Circuit's decision so as to resolve the critical conflict in the circuits in their treatment of evidence of pretext, and to ensure that the dictates of *Monsanto* and *Sharp* concerning communications on price and price levels be uniformly applied, lest routine business communications between a manufacturer and its dealers be transformed into antitrust violations.

A. The Parties And Their Businesses

Petitioner BMW NA is the exclusive authorized importer of BMW motor vehicles from Germany. The BMW automobile has always been a high-line, high-priced European luxury import. Beginning in 1984, BMW NA implemented a five to six year strategy to position its product at the upper end of the luxury automobile market in more direct competition with Mercedes-

Benz. A175-76, 433-35, 476-77, 1193, 2619, 2621, 2626. Toward that end, BMW NA has established rigorous minimum standards for the sales, service and parts operations of BMW dealers and continuously works with its dealers to ensure compliance with these standards. A196-98, 1158-90. BMW NA also spends tens of millions of dollars each year on national advertising to maintain the BMW image so that BMWs can compete with other high-line luxury automobiles. A448-50, 683. BMW NA prefers and stresses the benefits of image advertising to its dealers, although BMW NA does not prohibit its dealers from price advertising.[2]

Respondents Robert and Alan Potamkin, along with their father Victor Potamkin and other business associates, comprise the Potamkin organization ("the Potamkins"). As the dissenting opinion in the Third Circuit noted, "the Potamkins ha[ve] built a huge retail business by selling cars in high volume at small markup over the prices paid to various manufacturers." App. at 76a, n. 7, *see* A22, 581, 626-27. Hand in hand with this image has been a reputation marred by government investigations into, and consumer complaints about, Potamkin business practices and service. A863-66, 972-1136. The Potamkin organization's advertising philosophy is that of a bargain basement, employing many distress-sale terms. A199-200, 313-14, 319-21, 1139-40, 1144, 1155.

B. Early Dealings Between BMW NA And The Potamkins

In 1980-81, several years before BMW NA implemented a

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2. BMW dealers often pool their funds to pay for regional advertising, as organized by the local Dealer Advertising Group ("DAG"). A2460. As respondents freely admit, DAGs are common in the automobile industry, and the record is undisputed that the only thing discussed at BMW DAG meetings is advertising strategy, not price. A2443-45, 2450, 2460, 2467-69, 2490-91.

marketing strategy to position its product at the upper end of the luxury car market, the Manager of BMW NA's Eastern Region held preliminary discussions with Victor Potamkin concerning a possible BMW franchise on Long Island, in response to Victor Potamkin's inquiry as to a possible dealership. A251-57, 639-42, 1202. The discussions never reached the point where an application was submitted. Victor Potamkin was never approved - tentatively or otherwise - for a BMW franchise. A261, 288-89, 645, 1203.[3]

C. Philadelphia, 1985: The Potamkins Are Incompatible With The Upgrade Strategy

In October, 1985, Irvin Green, a Philadelphia BMW dealer, entered into a buy/sell agreement with a corporation owned principally by Robert and Alan Potamkin. Within less than two weeks, Green was told that the Potamkins were not likely to be considered suitable candidates and the chances of approval were less than 50/50. A105, 108-10, 397, 601-06, 1204. Nonetheless, BMW NA set in motion its regular evaluation process so as to allow the Potamkins an opportunity to alter BMW NA's initial conclusions, and to comply with its obligations under the Pennsylvania Board of Vehicles Act, 63 Pa. Stat. Ann. § 818.1 *et seq.*, which prohibits the unreasonable withholding of consent to a transfer of a franchise.

After receiving written reports from the region recommending that the Potamkin application not be approved for a variety of reasons, the BMW NA national headquarters executives reviewed the application and sent a letter to Irvin Green stating that there was

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3. The Complaint is silent with respect to any attempt by Victor Potamkin to obtain a BMW dealership in Great Neck, Long Island in 1980-81. As the district court stated and the Court of Appeals recognized, "Victor Potamkin is not a party, and the statute of limitations has expired. . . ." A2585; App. at 5a.

a "fundamental incompatibility between the 'BMW NA' corporate image and the 'Potamkin' image." A859-68; *see* A187-95, 533-34, 869-72. As executives steeped in the auto industry, the BMW NA decision makers were all well aware of the poor reputation of the Potamkin dealerships and were further aided by the report of an outside investigator. A430-32, 451-52, 454-56, 546-47, 674-75, 677-78, 680. BMW NA's fears of poor service and low customer satisfaction were reinforced by the Potamkins' outright refusal to sign the required form signifying their agreement to cure certain deficiencies in their proposal so as to meet then-current BMW NA minimum operating standards, and further were compounded by the Potamkins' adamant demand for *assurances* that they would receive hundreds of additional cars above Green's Sales Planning Guide ("SPG"), which the Potamkins customarily would have inherited. A102, 184-85, 193, 437-39, 527-31, 541-42; *see also,* 294-95. BMW NA also considered the Potamkin image as reinforced over the years by their gimmicky, distress-sale type advertisements – an image that did not emphasize product quality and thus did not mesh with BMW NA's image as an upscale franchise. A684-86; *see also,* 431-32. BMW NA also considered it disadvantageous, particularly in light of its marketing strategy, to be represented by a dealer widely and predominantly known for carrying low-line and middle-line automobiles in automalls and to be located in a predominantly blue collar inner-city location. A118-19, 189, 312, 346-48, 381-82, 394-95, 455-56, 531-32, 871-72, 897. Finally, BMW NA found the Potamkin applicants to be uncooperative and confrontational. A206-08, 535-36, 1158-90.

D. Manhattan, 1985: Achieving BMW NA's Goal Of Making Manhattan A One-Dealer Town

In the fall of 1985, BMW NA had two dealers in Manhattan, Trans-Atlantic and Martin Motors. A212-13, 712. Research had indicated that Manhattan was a prime example of overdealerization, and that it was appropriately a "one-dealer market." A296-97. In 1984, under a plan dubbed the "Manhattan

Project," BMW NA considered closing down *both* Trans-Atlantic and Martin Motors in order to open one glamorous factory store comparable to other European high-line factory stores in Manhattan. A298-99, 873-85. Preliminary discussions were held in 1984 with the owners of both Trans-Atlantic and Martin Motors about the possibility of BMW NA buying them out. A176, 214-16. Although the Manhattan Project ultimately was not carried out as originally planned, it remained BMW NA's objective to change its Manhattan representation to achieve its "Market Representation Plan" objective of only one dealer. A296-303.

Prior to the end of September, 1985, BMW NA had meetings with the principals of Trans-Atlantic during which they were informed that BMW NA was interested, upon the expiration of Trans-Atlantic's lease, in purchasing TransAtlantic for the purpose of closing the dealership. A303-05. Thereafter, Trans-Atlantic's counsel reported that Trans-Atlantic was negotiating with Victor Potamkin for the sale of the dealership. A86-87, 1335-36. BMW NA quickly informed Trans-Atlantic that BMW NA approval of a sale to Potamkin was doubtful in light of, first, its objective to make Manhattan a one-dealer town, and, second, its view that the Potamkin operation was not the kind of operation with which they wanted to associate BMW. A308-10, 1335-36, 163-34. BMW NA and Trans-Atlantic eventually reached an agreement for the purchase of Trans-Atlantic's assets.

E. The Allegations Of An Unlawful Agreement

The alleged evidence of concerted action – termed "slender" by Judge Roth in dissent (App. at 67a) – can be easily distilled, and consists of the following: first, an affidavit from a former BMW dealer recounting complaints regarding a putative Potamkin appointment in Great Neck back in 1981;[4] second, a triple hearsay,

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4. According to the dealer, Harry Gray, "BMW dealers at a [DAG] meeting [in 1980-81] said they had already spoken to Terry Cronin, the BMW (Cont'd)

after-the-fact recapitulation by an ex-employee of Potamkin of "street talk" concerning dealer opposition to a 1985 Potamkin appointment in Philadelphia; and third, the Potamkins' attack on the *bona fides* of BMW NA's stated business reasons for turning them down. There is no alleged evidence of any kind of any complaint regarding a 1985 Manhattan appointment. In fact, the uncontradicted evidence is that the only named co-conspirator with regard to the Manhattan franchise, the principal of Martin Motors, did not even know of the Potamkins' bid for Trans-Atlantic. A901.

Contradicting the implications the Potamkins attempt to draw from the above-listed evidence stands a bulwark of testimony from the BMW NA executives and BMW dealers that they did not even confer regarding a Potamkin appointment in Philadelphia and Manhattan – let alone, enter into any agreement. After the depositions of a dozen dealers and every BMW NA employee even peripherally involved, there is no record of any oral or written communication between the dealers and BMW NA on the subject of the Potamkins' attempts to purchase the two dealerships, except one call from a dealer wishing to recommend Potamkin.

F. Proceedings in the District Court

In granting BMW NA's motion for summary judgment on the antitrust claim, the District Court concluded that there was an "absence of any direct evidence to establish that other dealers were opposed to plaintiffs' applications, or that other dealers

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(Cont'd)
Regional Manager . . . opposing Mr. Potamkin's BMW franchise appointment, and that they would continue to speak to him on this subject. . . . I subsequently came to understand that Terry Cronin had opposed this appointment, which I concluded was in response to the New York area BMW dealers' objections." A1542-43.

complained to defendant about plaintiffs' pending applications, or that defendant's denial of plaintiffs' applications were in response to dealer complaints." App. at 83a. The District Court dismissed the Gray affidavit as nothing more than evidence of dealer opposition in 1981: "Mr. Gray's opinion that there was a causal relationship between the dealers' opposition and Mr. Cronin's ultimate decision is, admittedly, based on nothing more than the fact that some dealers did express opposition at the meeting he attended, and that Mr. Cronin later recommended against Potamkin. That kind of unfounded speculation would not be admissible at trial, and does not prove anything." App. at 85a. As for the triple hearsay, after-the-fact recapitulation of street talk, the District Court ruled it both inadmissible and inconsequential as a matter of law. App. at 87a. Finally, the District Court emphasized that, while "[d]efendant's lack of sincerity in processing the Robert Potamkin application for the Irvin Green franchise can be viewed as reflecting hostility . . . [t]he seeming animosity disclosed by the evidence is essentially irrelevant to the antitrust issues." App. at 90a.

G. Proceedings in the Court of Appeals

The Court of Appeals reversed the District Court's grant of summary judgment. First, it reversed the District Court's evidentiary rulings and held the evidence of complaints admissible.[5] It then found that this complaint evidence, in conjunction with evidence that BMW NA was insincere in the evaluation process, was sufficient evidence to tend to exclude the possibility that BMW NA was acting independently. A vigorous dissent was filed on both grounds.

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5. As noted by Judge Roth in her dissent, in order to muster up complaints with regard to a Philadelphia appointment, "[t]he majority [went] to great lengths to find [the triple hearsay] testimony admissible." App. at 71a.

In its opinion, the Third Circuit relied heavily on the fact that in 1981-82 BMW NA apparently considered the Potamkins' request for a Great Neck dealership and supposedly remarked during that period of time to Robert Potamkin that he consider purchasing the Green Philadelphia franchise – despite the fact that these alleged events occurred four years before the transactions at issue. The majority also accepted the Gray affidavit as evidence of BMW NA knuckling under in 1980-81 – while admitting, as the dissent notes, that the affidavit contains no evidence that BMW NA considered the dealers' alleged demands or acted in response to those demands. App. at 22a, 67a. Nowhere does the Third Circuit opinion adequately address the lack of any evidentiary link between the alleged complaints recounted in the Gray affidavit regarding a 1980-81 *Great Neck* appointment and the applications four years later for an appointment in *Manhattan* and *Philadelphia*, the latter of which has an entirely different set of area dealers.

Faced with otherwise meager alleged evidence of an antitrust violation, the Third Circuit devoted extensive attention to examining in fine detail whether BMW NA's asserted business reasons were consistent with its prior and future actions, including its treatment of other applicants and existing BMW dealers. Contrary to the rulings of several courts of appeal, the Third Circuit concluded that evidence of pretextual reasons, in and of itself, qualified as evidence of concerted action. More specifically, the Third Circuit found that the fact that "[t]he Potamkins have countered each alleged reason with [contrary] evidence ... provides independent support for the Potamkins' claim that BMW NA and its dealers acted in concert to repel any Potamkin competition in BMW sales." App. at 55a.

The Third Circuit also rejected BMW NA's argument that because respondents could show no evidence that BMW dealers had agreed with BMW NA concerning the price or price levels to be charged for BMWs, respondents failed to satisfy the evidentiary

requirements imposed by *Sharp*. Rather, the Third Circuit ruled that a "tacit" agreement can be found to have existed between BMW NA and its dealers to fix the prices of BMW automobiles. In sharp contrast to the rulings of this Court that forbid inferences of concerted activity to be drawn exclusively from ambiguous evidence, the Third Circuit relied solely upon evidence that (i) BMW NA representatives and its dealers shared and discussed retail price statistics and (ii) BMW dealers set their collective advertising budget contributions at a certain amount for each BMW sold. From this evidence alone, the Court of Appeals determined that respondents could show an agreement on the price or price levels to be charged by dealers, thus satisfying their burden under *Sharp*.

REASONS FOR GRANTING THE WRIT

The Third Circuit's holding that evidence countering BMW NA's alleged business reasons for declining to award franchises to the Potamkins provides independent proof of concerted action stands in sharp conflict with the rulings of three other circuits. The First, Second, and Seventh Circuits have all ruled squarely that the mere fact that a disappointed applicant or terminated dealer can question the business reasons advanced for not awarding a franchise does not, by itself, or coupled with evidence of complaints, justify the inference that the conduct was the result of a conspiracy. In contrast, other circuits such as the Ninth, like the Third Circuit in this case, have ruled that evidence of pretext constitutes proof of concerted action. These contradictory interpretations of the Sherman Act argue strongly for review by this Court.

The Third Circuit's holding also threatens to nullify this Court's decision in *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752 (1984), which counsels that something significantly more than complaints must be present to warrant a finding of concerted action and warns against the considerable dangers to

procompetitive behavior where an inference of concerted action may be "drawn from highly ambiguous evidence." 465 U.S. at 763. Evidence of "pretext" is a classic example of such ambiguous evidence, since both anti- and pro- competitive inferences may be drawn from it: while a manufacturer may provide inaccurate reasons for its actions to mask an unlawful agreement, a manufacturer may equally provide inaccurate reasons "because of a desire to avoid controversy or some other consideration." *H.L. Moore Drug Exchange v. Eli Lilly & Co.*, 662 F.2d 935, 941 (2d Cir. 1981), *cert. denied*, 459 U.S. 880 (1982). As Judge Roth noted in her dissent, "the mere fact that the Potamkins can question the business reasons advanced by BMW NA for not awarding the Potamkins any of the franchises, does not, by itself, justify the inference that BMW NA's conduct was therefore the result of a conspiracy. . . . And *Monsanto* teaches us that such a conspiracy cannot be inferred from highly ambiguous evidence." App. at 76a-77a.

The Third Circuit's decision also undermines a manufacturer's right to choose, on any grounds, those with whom he wishes to deal – a right long recognized as central to competition in *United States v. Colgate & Co.*, 250 U.S. 300 (1919). The constraining effect of the Third Circuit's decision on the freedom of manufacturers to terminate existing dealers or turn away prospective applicants so significantly impairs manufacturers in the implementation of their competitive strategies as to warrant review by this Court.

The Third Circuit's decision not only distorts the proof necessary to meet the first requirement of a *per se* antitrust claim – proof of an agreement – but also the second requirement of such a claim – the requirement of *Sharp* that there be an agreement as to price or price levels. The Third Circuit's decision on this issue also warrants review by this Court because it directly conflicts with *Monsanto's* recognition that "communication about prices and

marketing strategy" are routine and legitimate exchanges of information which do not, without more, signify agreement as to price. 465 U.S. at 762. The business practices at issue here – BMW NA's monitoring of its dealers' retail price statistics and the dealers' collective setting of advertising budgets – are commonly utilized throughout the automobile industry, as well as in other industries in which franchises or other similar relationships are employed. Thus, the Third Circuit's decision threatens to deter legitimate conduct whose very widespread practice is a testament to its usefulness in the competitive arena.

I.

CERTIORARI SHOULD BE GRANTED TO REVIEW THE ERRONEOUS DECISION OF THE THIRD CIRCUIT THAT EVIDENCE MERELY CHALLENGING A MANUFACTURER'S STATED BUSINESS REASONS FOR REFUSING TO DEAL CAN QUALIFY AS THE NECESSARY SUPPLEMENTAL EVIDENCE, IN ADDITION TO COMPLAINTS, REQUIRED TO PROVE AN UNLAWFUL AGREEMENT.

A. A Grant Of Certiorari Is Necessary To Resolve The Conflict Between The Circuits As To Whether Evidence Of Pretext Is Proof Of A Conspiracy.

In *Monsanto*, this Court decreed that there must be "something more than evidence of complaints" to prove concerted action under the Sherman Act. 465 U.S. at 764. Rather, there must be "evidence that tends to exclude the possibility" of unilateral action. *Id.* In two significant antitrust opinions, the case at bar and *Fragale & Sons Beverage Co. v. Dill*, 760 F.2d 469, 474 (3d Cir. 1985), the Third Circuit has staked out the position that evidence which merely challenges a manufacturer's stated business reasons for refusing to deal with a potential distributor is sufficient as the

necessary supplemental evidence, in addition to complaints, required under *Monsanto* to reasonably tend to prove that the manufacturer and existing distributors had an unlawful agreement under Section 1 of the Sherman Act. The Ninth Circuit has taken a similar view. *Dimidowich v. Bell & Howell,* 803 F.2d 1473, 1480 (9th Cir. 1986). These decisions by the Third and Ninth Circuits are in direct conflict with decisions by the First, Second and Seventh Circuits. *Bruce Drug, Inc. v. Hollister, Inc.,* 688 F.2d 853 (1st Cir. 1982); *H.L. Moore Drug Exchange v. Eli Lilly & Co.,* 662 F.2d 935 (2d Cir. 1981), *cert. denied,* 459 U.S. 880 (1982); *Lamb's Patio Theatre, Inc. v. Universal Film Exchanges, Inc.,* 582 F.2d 1068 (7th Cir. 1978).

Even prior to *Monsanto,* the Second Circuit had established that evidence of pretext cannot qualify as independent evidence of concerted action. As stated by the Second Circuit in *H.L. Moore Drug Exchange v. Eli Lilly & Co.,* 662 F.2d at 941: "[T]he mere fact that a business reason advanced by a defendant for its cut-off of a customer is undermined does not, by itself, justify the inference that the conduct was therefore the result of a conspiracy (citation omitted)." The court explained:

> In any event, viewing the nine examples in the light most favorable to Moore, the most that the jury could permissibly infer was that Lilly had some reason other than its non-affiliation policy for terminating Moore. . . . But such a pretext would not itself establish a conspiracy. *The fact that Lilly may have had other reasons to terminate Moore makes it neither more nor less probable that Lilly acted in concert with others rather than unilaterally.*

622 F.2d at 943 (emphasis added).

Since the ruling in *H.L. Moore Drug Exchange*, the Second Circuit consistently has held that evidence of false or inaccurate reasons proffered by a manufacturer does not give rise to an inference of concerted action. *See, e.g., H.L. Hayden Co. v. Siemens Medical Systems, Inc.*, 879 F.2d 1005, 1014 (2d Cir. 1989); *Reborn Enterprises, Inc. v. Fine Child, Inc.*, 590 F. Supp. 1423, 1438 (S.D.N.Y. 1984), *aff'd*, 754 F.2d 1072 (2d Cir. 1985).

Likewise, other circuits correctly have noted the lack of a necessary logical nexus between the provision of inaccurate or inconsistent reasons and an inference of concerted action, and accordingly have refused to equate evidence of pretext with evidence of conspiracy. In *Bruce Drug, Inc. v. Hollister, Inc.*, 688 F.2d at 856-57, a Sherman Act dealer termination case, the First Circuit ruled that "an affirmative finding of conspiracy is not to be supported simply by labeling a given reason pretextual." As the First Circuit explained:

> "Even if a manufacturer or supplier, acting independently, gave a false or inaccurate reason for its action, whether because of a desire to avoid controversy or some other consideration, this would not violate any legal obligation to the customer, absent proof of a conspiracy or breach of contract" [quoting *H.L. Moore Drug Exchange*, 662 F.2d at 941]. Put another way, it takes two to tango, and even a truly pretextual reason advanced by one party is not, without more, evidence binding the other alleged parties to prove an agreement.

688 F.2d at 857. *See also, Moffat v. The Lane Company, Inc.*, 595 F. Supp. 43, 49 (D. Mass. 1984) (refusing to find evidence of concerted action where the policy asserted to justify the refusal to deal had not been consistently or rationally enforced).

In *Lamb's Patio Theatre, Inc. v. Universal Film Exchanges, Inc.*, 582 F.2d at 1070, a Sherman Act refusal to deal case, the Seventh Circuit reached a similar conclusion:

> Absent a showing of conspiracy by [the plaintiff], [the defendant] had no obligation to produce any reasons for refusing to deal with [the plaintiff]. Thus even if [the plaintiff] could show that [the defendant's] announced business reasons were not legitimate, such showing would not satisfy [the plaintiff's] burden of establishing the existence of the conspiracy element essential to its *prima facie* antitrust case.

See Magid Mfg. Co., Inc. v. U.S.D. Corp., 654 F. Supp. 325, 331 (N.D. Ill. 1987).

In conflict with these decisions in the First, Second and Seventh Circuits, and ignoring this Court's warning in *Monsanto* about the considerable dangers to procompetitive conduct of inferring conspiracy from ambiguous evidence, the Third Circuit has willingly embraced arguments of pretext as a means of denying motions for summary judgment in antitrust cases. In the case at bar, the Third Circuit has likewise relied on evidence challenging BMW NA's asserted business judgment as independent proof of concerted action without providing any reasoning for its departure from the principles of *Monsanto* or the rulings of the First, Second, and Seventh Circuits. More specifically, the Third Circuit has held without elaboration that the fact that, "[t]he Potamkins have countered each alleged reason with [contrary] evidence . . . provides independent support for the Potamkins' claim that BMW NA and its dealers acted in concert to repel any Potamkin competition in BMW sales." App. at 55a.

The Third Circuit's decision in this case follows similar holdings by that Circuit. In *Fragale & Sons Beverage Co. v. Dill*, 760 F.2d 469, a beer retailer sued two distributors, alleging that they had each entered into an unlawful agreement with another retailer to exclude him. With respect to one of the two distributors, the *only* evidence of concerted action was an initial meeting of undescribed content between the distributors and the other retailer, a subsequent conversation in which the distributor informed the plaintiff retailer that he would not sell to him, and evidence of pretext. The *Fragale* court stated, without support or further reasoning: "This evidence of pretext, if believed by a jury, would disprove the likelihood of independent action on the part of [the distributor]." 760 F.2d at 474.

Other courts including the Ninth Circuit have also found evidence of pretext to be probative of conspiracy in decisions which are equally cursory in their analysis.[6] The above-described conflict between the circuits calls for a grant of BMW NA's petition, so as to ensure uniform decision making in the critical determination of what constitutes concerted action in violation of the antitrust laws.

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6. *See Dimidowich v. Bell & Howell*, 803 F.2d 1473, 1480 (9th Cir. 1986) ("A jury reasonably could conclude that [the] stated reason for refusing to sell to [plaintiff] was a mere pretext. Thus, [plaintiff] has presented evidence that tends to support an inference of concerted action by [the alleged conspirators] and tends to exclude the possibility of independent action"); *cf. DeLong Equipment Co. v. Washington Mills Abrasive Co.*, 887 F.2d 1499, 1514 (11th Cir. 1989), *cert. denied*, 494 U.S. 1081 (1990) ("while such evidence [of pretext] standing alone would not be sufficient to show concerted action in violation of the antitrust laws, evidence of pretext, if believed by a jury, would disprove the likelihood of independent action on the part of [the defendant]"). In these two decisions, the facts at least reflect additional evidence of concerted action in addition to evidence of pretext — in stark contrast to the Third Circuit's reliance on evidence of pretext in near isolation.

B. Certiorari Should Be Granted Because The Third Circuit's Decision Regarding Pretext Conflicts With *Monsanto* and *Colgate*.

A grant of certiorari is necessary to preserve the teachings of *Monsanto*, which have been eviscerated by the Third and Ninth Circuits' rulings concerning the value of evidence of pretext. As *Monsanto* recognized, "it is of considerable importance that independent action by the manufacturer . . . be distinguished from price-fixing agreements . . . . If an inference of such an agreement may be drawn from highly ambiguous evidence, there is a considerable danger that the doctrines enunciated in . . . *Colgate* will be seriously eroded." 465 U.S. at 763. In keeping with that notion, *Monsanto* not only held that complaints about price cutters, which are "natural – and from the manufacturer's perspective, unavoidable – reactions," are insufficient to prove concerted action, but also set a high standard for the necessary supplemental evidence:

> Thus, something more than evidence of complaints is needed. There must be evidence that tends to exclude the possibility that the manufacturer and nonterminated distributor were acting independently. As Judge Aldisert has written, the antitrust plaintiff should present direct or circumstantial evidence that reasonably tends to prove that the manufacturer and others "had a conscious commitment to a common scheme designed to achieve an unlawful objective." *Edward J. Sweeney & Sons, Inc. v. Texaco, Inc.*, 637 F.2d 105, 111 (3d Cir. 1980), *cert. denied*, 451 U.S. 911 (1981); *accord, H.L. Moore Drug Exchange*, [662 F.2d at 941] (remaining citation omitted).

465 U.S. at 763-64.

Critically, in describing the necessary "something more," the Court wrote that evidence must be presented that an agreement to fix prices was both sought by one party and acquiesced in by the other. *Monsanto*, 465 U.S. at 764 n.9. Notably, in explaining what is required, the above-cited passage referred to the Second Circuit's decision in *H.L. Moore Drug Exchange*, discussed above. Thus, one of the very cases employed by this Court to define the "something more" required under *Monsanto* to prove concerted action rejects the notion that evidence undermining a manufacturer's stated business reasons is probative of conspiracy.

The Third and other circuits which have relied on pretext evidence as proof of concerted action have run afoul of the principles of *Monsanto* in several ways reviewed below.

1. Competing Inferences Can Be Drawn From Evidence of Pretext.

First, following precepts of logic, evidence of pretext does not indicate that there has been an agreement, but rather is inherently ambiguous. The Third Circuit and other courts which have relied on pretext evidence fail to address the gap in reasoning between their premise that a manufacturer or distributor such as BMW NA may have provided pretextual reasons and their conclusion that such an action must have been taken in an effort to mask an antitrust violation, as opposed to the many other alternative reasons why BMW NA or any other defendant might not wish to announce its grounds for decision — including a distaste for, or hostility toward, the plaintiff and his operations. This is the very type of highly ambiguous evidence, permitting dual inferences, that *Monsanto* and *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588 (1986), decreed should not be treated as proof of a conspiratorial agreement.[7]

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7. So as not to rely on evidence of pretext alone, the Third Circuit tried to make much of BMW NA's initial willingness to consider granting franchises to

(Cont'd)

2. Reliance On Pretext Evidence As Proof Of Conspiracy Inhibits Procompetitive Behavior Protected By Colgate *And* Monsanto.

Second, in light of the competing possibilities as to why a manufacturer would provide insincere reasons to a rejected or terminated distributor, reliance on evidence of pretext as proof of concerted action inhibits the procompetitive behavior explicitly protected by *Colgate* – namely, "the long recognized right of a trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal." 250 U.S. at 307. This Court has never wavered in protecting the sanctity of this right. Indeed, in *Eastern States Lumber Ass'n v. United States*, 234 U.S. 600, 614 (1914), this Court held this right to be "unquestioned" and exercisable by a trader "for reasons sufficient to himself." *See also, Federal Trade Comm'n v. Raymond Bros. - Clark Co.*, 263 U.S. 565, 573 (1924). That discretion will be constrained by the need to be fully candid with unacceptable potential and present distributors upon pain of antitrust treble damage liability. Recognition of the importance of this right played a critical role in this Court's decision in *Monsanto* to place a substantial burden on antitrust plaintiffs and not allow ambiguous evidence to suffice in the proof of a conspiracy. 465 U.S. at 763. Thus, review of this Court is necessary to preserve the manufacturer's right to implement its competitive strategies both when it does, and does not, wish to announce its reasons publicly.

(Cont'd)
the Potamkins in 1980-82. These early overtures do not alter the fact that competing inferences may be drawn from the provision of purportedly pretextual reasons. Even if BMW NA had, three or four years prior, been willing to consider the prospect of Potamkin franchises, many intervening events – including an increase in BMW NA's distaste for the Potamkins and their operations – could have prompted BMW NA's actions in 1985. Thus, "a desire to avoid controversy or some other consideration" still provides an equally possible explanation for the alleged provision of pretextual reasons. *H.L. Moore Drug Exchange*, 662 F.2d at 941.

3. The Third Circuit Subverts The Principles Of Summary Judgment By Focusing On The Reasonableness Of Business Decisions, Rather Than Evidence Of An Agreement.

Third, the Third Circuit's decision here, and similar decisions in the Ninth Circuit, dramatically subvert the use of summary judgment in an antitrust case so that it is now dependent on a court's "determin[ation of] whether there is a genuine issue of material fact with respect to [the defendant's] explanation [rather than] . . . searching for evidence in the record to support a finding of conspiracy." *Magid Mfg. Co.*, 654 F. Supp. at 330. In essence, the Third Circuit transformed the question of BMW NA's business judgment regarding the incompatibility of the Potamkin image with BMW's image into the critical inquiry in determining the existence of an antitrust violation. Stated differently, the Circuit Court has mandated that BMW NA bear the costs of trial because it disagrees with the fundamental business judgment (right or wrong) of the BMW NA executives – whose careers have been devoted to studying the automobile industry – that the Potamkins' poor reputation is at odds with their corporate strategy. Alleged mistakes in business judgment should not expose the manufacturer to antitrust liability.

An examination by the lower courts of BMW NA's or any other manufacturer's reasons for declining to grant a franchise brings courts into the very thicket of ambiguous evidence that *Monsanto* dictated was inappropriate when searching for evidence of concerted action. In fact, even the finding that BMW NA's reasons were pretextual was not a ready conclusion. Indeed, Judge Roth, in dissent, strongly argued that "the relevant literature suggests that the defendant had credible business reasons for rejecting the Potamkins' dealership applications." App. at 75a-76a (listing several business reasons found to be credible).

Moreover, most antitrust plaintiffs will be able to mount *some* argument that the manufacturer's decision was not in accord with

its former practices or later actions, simply by nature of the fact that the complex realities of the business world dictate that different considerations take precedence at different times. To permit denials of summary judgment in antitrust cases on the often-close weighing of arguments as to the rationality of the defendant's decision would create the very dangers foreseen by the Court in *Monsanto*, including the possibility of liability in the absence of concerted action. It would also lead to a flood of meritless antitrust actions by disappointed plaintiffs and cripple the recently re-established use of summary judgment as a meaningful tool for managing antitrust cases.[8]

II.

THE COURT OF APPEALS' DECISION AS TO WHAT CONSTITUTES SUFFICIENT EVIDENCE OF RESALE PRICE MAINTENANCE CONFLICTS WITH THIS COURT'S DECISIONS IN *SHARP* AND *MONSANTO*.

This Court has long decried efforts to construct resale price maintenance claims from legitimate business conduct or otherwise competitively ambiguous evidence.[9] The Third Circuit's decision stands in stark contrast to the principles enunciated by the Court in those decisions.

According to the Third Circuit, BMW NA and its dealers can

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8. If this Court reverses the Third Circuit's ruling that evidence questioning BMW NA's reasons for opposing the Potamkins' efforts to purchase BMW dealerships qualifies as independent evidence of conspiracy, the remaining evidence is clearly insufficient to demonstrate concerted action. Both the Gray affidavit and the triple hearsay testimony, even if admissible, reveal only complaints, and fail to demonstrate the necessary communication of acquiescence by BMW NA. *Monsanto*, 465 U.S. 752.

9. *Sharp*, 485 U.S. 717; *Monsanto*, 465 U.S. 752; *see also*, *Continental T.V. v. GTE Sylvania*, 433 U.S. 36 (1977).

be found to have "tacitly" fixed prices on BMW automobiles, yet the *only* evidence from which this agreement is inferred consists of legitimate business conduct that is practiced throughout the automobile industry. The chilling effect that this decision is certain to have warrants review by this Court.

In *Sharp*, the Court clarified the standard by which resale price maintenance claims are to be measured. It held that the termination of a price-cutter is not *per se* unlawful resale price maintenance unless there is a further agreement on the price or price levels to be charged by the remaining dealer. *Sharp*, 485 U.S. 726-27. Relying upon *Monsanto*, the Court in *Sharp* required that this agreement be demonstrated by evidence having "demonstrable economic effect." 485 U.S. at 726. "Highly ambiguous evidence" does not satisfy this rigorous evidentiary standard. *Id.* In this case, the Third Circuit ignored this principle by finding that an inference "that BMW NA and its dealers have tacitly fixed prices for BMWs" could be supported solely by evidence that (i) BMW NA representatives and dealers share and discuss retail price statistics; and (ii) BMW dealers set their collective advertising budget contributions at a certain amount per BMW sold. App. at 42a-43a.

This evidentiary standard eviscerates this Court's holdings in *Monsanto* and *Sharp* because it permits inferences of concerted activity as to price to be drawn from "communication about prices and marketing strategy" —conduct that this Court determined to be highly ambiguous. *Monsanto*, 465 U.S. at 762. The Third Circuit' s ruling that this evidence *alone* satisfied the requirements of *Sharp* turns back the antitrust clock and exposes everyday manufacturer-distributor interactions to potential *per se* antitrust liability. The Third Circuit's evidentiary rule will inevitably have a chilling effect on manufacturers' relations with their distributors.

Monsanto instructs that a manufacturer has legitimate reasons to be interested in its distributors' resale prices and to exchange

information with its dealers about them. As the Court explained: "distributors are an important source of information for manufacturers. In order to assure an efficient distribution system, manufacturers and distributors constantly must coordinate their activities to assure that their product reaches the consumer persuasively and efficiently." *Monsanto*, 465 U.S. at 763-64. In keeping with this directive, the Court warned against permitting inferences of concerted action to be drawn from conduct the competitive effects of which are ambiguous.

> [T]he fact that a manufacturer and its distributors are in constant communication about prices and marketing strategy does not alone show that the distributors are not making independent pricing decisions. A manufacturer and its distributors have legitimate reasons to exchange information about the prices and the reception of their products in the marketplace. . . . The manufacturer often will want to ensure that its distributors earn sufficient profit to pay for programs such as hiring and training additional salesmen or demonstrating the technical features of the product, and will want to see that 'free-riders' do not interfere. [Citation omitted]. Thus, the manufacturer's strongly felt concern about resale prices does not necessarily mean that it has done more than the *Colgate* doctrine allows.

465 U.S. at 762-63. Thus, this Court crafted an evidentiary standard to establish vertical concerted activity that "eschewed adoption of an evidentiary standard that 'could deter or penalize perfectly legitimate conduct' or 'would create an irrational dislocation in the market' by preventing legitimate communication between a manufacturer and its distributors."

Sharp, 485 U.S. at 726 (citing *Monsanto*, 465 U.S. at 763, 764).

Consistent with these principles, this Court has instructed that conduct "as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy." *Matsushita*, 475 U.S. at 588 (citing *Monsanto*, 465 U.S. at 764).

In flat contradiction to the decisions of this Court, the "tacit" resale price maintenance scheme potentially found to exist in this case by the Third Circuit is evidenced *solely* by conduct that *Monsanto* expressly identified as highly ambiguous. *Monsanto* teaches that discussions between a manufacturer and its dealers concerning prices, standing alone, cannot support an inference of concerted action. As was acknowledged in *Monsanto*, a manufacturer has a legitimate interest in the financial viability of its dealers. *Monsanto*, 465 U.S. at 762-63.

In this case, the evidence that has been adduced, if anything, reinforces the crucial competitive role played by the exchange of such information. As one BMW NA executive explained: "If our dealers aren't profitable, we're not profitable. If they have to sell a product at a loss or at small profits, they will not be able to represent the franchise in the manner in which we believe it should be represented."[10] A464-65, 2393.

In addition, the Third Circuit's speculation that the advertising contributions, made on a per car basis, by members of BMW Dealer Advertising Groups ("DAGs") constitute probative

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10. Similarly, all automobile manufacturers monitor and review dealer profitability. As one dealer testified: "It is customary in the automobile business for manufacturers to provide dealers with a financial analysis of their dealership compared to other dealerships of like size ... I receive them from all the manufacturers." A2464; *see* A2322, 2400-01, 2441-42, 2448.

evidence of possible dealer animus toward discounters and, in turn, of an unlawful resale price maintenance scheme similarly ignores competitive realities. Collective advertising programs, such as the BMW DAGs, are commonplace in the automobile industry, as well as in other retail industries. Utilization of collective advertising groups such as DAGs allows a manufacturer to increase its advertising exposure with geographically-tailored advertising campaigns. *See* A2485-86, 2491, 2742-44. To permit such demonstrably competitive activity to support an inference of unlawful concerted activity is antithetical to the very purpose to be fostered by the antitrust laws.[11]

In erecting an evidentiary standard that permits inferences of a price-fixing conspiracy to be drawn from evidence that is no more probative of conspiracy than of procompetitive lawful unilateral action, the Third Circuit's ruling in this case cannot be reconciled with the dictates of this Court. The impact upon the marketplace of the Third Circuit's ruling is also clear: to permit inferences of concerted action to be drawn from legitimate and necessary business conduct will "both inhibit management's exercise of its independent business judgment and emasculate the terms of the statute." *Monsanto*, 465 U.S. at 764 (citing *Edward J. Sweeney & Sons*, 637 F. 2d at 111, n.2). Thus, the Third Circuit's decision substantially undermines the procompetitive benefits this Court has sought to foster since *GTE Sylvania*.

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11. Ironically, as the Court of Appeals noted, each of respondents' dealerships belongs to its corresponding Dealer Advertising Group. App. at 48a.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Filed August 6, 1992

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 91-1339 and 91-1458

BIG APPLE BMW, INC.;
POTAMKIN BMW AND VW, INC.;
ROBERT POTAMKIN;
ALAN POTAMKIN,
Appellants in No. 91-1339

vs.

BMW OF NORTH AMERICA, INC.; AND
BAYERISCHE MOTOREN WERKS, A.G.

BIG APPLE BMW, INC.;
POTAMKIN BMW & VW, INC.;
ROBERT POTAMKIN;
ALAN POTAMKIN

vs.

BMW OF NORTH AMERICA, INC.; AND
BAYERISCHE MOTOREN WERKS, A.G.

BMW of North America, Inc.,
Appellant in No. 91-1458

Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Civ. No. 87-02258)

Appendix A

Argued
November 18, 1991

Before: MANSMANN, COWEN and ROTH,
Circuit Judges.

(Filed August 6, 1992)

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Appendix A

OPINION OF THE COURT[1]

MANSMANN, *Circuit Judge*.

In these cross appeals, we are once again called upon to delineate that quantum of evidence necessary for an antitrust plaintiff to prove in order to withstand a motion for summary judgment. Here the unsuccessful applicants for several BMW franchises brought suit against the United States distributor for BMW automobiles, BMW of North America (BMW NA). The applicants (the Potamkins) assert that BMW NA and its dealers violated the Sherman Act by engaging in concerted action to exclude them from becoming dealers. BMW NA contends that it acted independently of its dealers and tenders business reasons for its refusal to deal with the Potamkins. In response, the Potamkins have countered each business reason with circumstantial evidence of concerted action. Thus faced with equal and competing inferences, we must apply to the standard for summary judgment, in which all inferences must be drawn in favor of the non-moving party, *Country Floors, Inc. v. A Partnership Composed of Gepner and Ford*, 930 F.2d 1056, 1061 (3d Cir. 1991), the holding in *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 768 (1984), that in an antitrust action "there must be evidence that tends to exclude the possibility of independent action by the manufacturer and distributor."

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1. References to portions of the record filed under seal have been deleted from the published version of this opinion.

Appendix A

The plaintiffs are brothers Robert and Alan Potamkin, and their corporate entities, Big Apple BMW, Inc. and Potamkin BMW and VW, Inc., who, in 1985, sought BMW franchises in Manhattan, New York and Philadelphia, Pennsylvania. The Potamkin family, which for our purposes includes Robert, Alan, and their father Victor, owns approximately 45 automobile franchises located in Manhattan, Philadelphia, Atlanta, and Miami. According to Victor, these franchises collectively amassed a sales volume of between $800 and $900 million in 1987 alone. A657.

The Potamkins asserted in their complaint that BMW NA and certain of its dealers engaged in a "group boycott to exclude plaintiffs and pursuant to a contract, combination or conspiracy with certain BMW dealers to fix, raise, maintain and stabilize prices of BMW automobiles in the United States." Compl. at ¶ 34. Briefly, BMW NA contends that it unilaterally rejected the Potamkins because their high volume price-discounter image is incompatible with the image of BMW NA and because the Potamkins did not meet other required standards.

We conclude that, for purposes of summary judgment, the Potamkins have set forth sufficient evidence of concerted action between BMW NA and its dealership body to exclude the Potamkins and further produced evidence that tends to show that BMW NA's alleged reasons for rejecting the Potamkins were pretextual. Thus, we will vacate the judgment with respect to the antitrust claims and the closely related pendent state law antitrust and tortious interference claims and remand them for further proceedings. These counts will then be joined with the Pennsylvania Board of Vehicles Act

claim, the sole claim that the district court had excepted from summary judgment, for further proceedings.

I.

The factual underpinnings for the Potamkins' claims arose from three distinct, but allegedly related, incidents in which the Potamkins negotiated with BMW NA and BMW dealers for franchises in the Philadelphia and New York City metropolitan areas. The first incident involved Victor Potamkin's negotiations for a Great Neck, New York franchise in 1981. It admittedly falls outside the statute of limitations but is included for the purpose of demonstrating a pattern of conduct. The latter two incidents comprise the Potamkins' basis for liability. We provide only a cursory sketch of these incidents here because the evidence will be later reviewed in detail.

First, during 1981, Victor Potamkin met with BMW NA representatives on several occasions to discuss Victor's acquisition of a Great Neck, New York BMW franchise. The Potamkins allege that Victor and BMW NA's Eastern Regional Manager Terry Cronin reached an oral agreement for a BMW franchise; BMW NA insists that their discussions terminated prior to any agreement because Victor allegedly attempted to bribe Cronin. Both parties agree that these discussions ended without a written agreement. By letter dated November 4, 1981, BMW NA conveyed to Victor its desire not to appoint a dealer in Great Neck. A1203.

The second incident occurred in 1985. Gladys Caufield, owner of the Trans-Atlantic BMW dealership in Manhattan, in anticipation of losing her lease, began to negotiate with the Potamkins.

A1613-14. In early September, they reached an oral agreement of sale for a price of $800,000 plus an undetermined amount for parts. In the ensuing months, however, BMW NA informed Caufield that it would not award a franchise to the Potamkins, and only days before the expiration of her lease, BMW NA offered her the significantly lower amount of $550,000, plus a repurchase of parts as required by the franchise agreement. A1640. She accepted this offer and BMW NA closed Trans-Atlantic, leaving only one dealer remaining in Manhattan. A1648-49.

The third incident occurred in Philadelphia, contemporaneously with the second, when Robert Potamkin entered into a written agreement to purchase the assets of Irvin Green's BMW dealership in October of 1985. A1720-47. This "buy-sell" agreement was contingent upon Robert's acquisition of a BMW franchise, and included an expiration date of December 23, 1985. A1729-30. Robert sought immediately to obtain a franchise application from BMW NA, and although they vigorously contest the reasons, both parties agree that Robert's application was not taken until October 29, 1985. Thus, as BMW NA recognized, it had 60 days from October 29th in which to act on the application under state law. After the buy-sell agreement expired on December 23rd, BMW NA informed Green that Potamkin was not a suitable candidate for a BMW franchise. A869-70.

The Potamkins filed suit in April of 1987, alleging that BMW NA violated section 1 of the Sherman Act, 15 U.S.C. § 1, sections 4 and 16 of the Clayton Act, 15 U.S.C. §§ 15, 26 (Count I), and the Pennsylvania Board of Vehicles Act, 63

Pa. Stat. Ann. § 818.1, et. seq. (Purdon's Supp. 1991) (Count II). In addition, the Potamkins alleged that BMW NA tortiously interfered with their contractual and prospective business advantage (Count III), committed state law civil conspiracy (Count IV), and utilized unfair methods of competition under Pennsylvania law and New York's Donnelly Act (Count V).

After lengthy and acrimonious discovery, in May of 1989, BMW NA moved for summary judgment. Much of the evidence provided in support of its motion involved information that the district court had ruled inadmissible in its April 18, 1989 order limiting discovery. A59-60. In answer to the Potamkins' responsive motion, as well as to amplify its previous order, the district court issued an order on June 2, 1989, which excluded, for purposes of summary judgment, "information concerning plaintiffs' specific customer satisfaction rankings except to the extent that such information was known to and allegedly relied upon by the defendant in 1985, and has been disclosed to plaintiffs in discovery . . . ."[2] A1448-49.

In due course, the district court ruled in favor of BMW NA on each count, except for Count II, the Pennsylvania Board of Vehicles Act claim, which it reserved for trial. The Potamkins sought and received a Rule 54(b) certification from the district court as to those counts on which summary judgment was entered. On the state law claim of Count II, the district court certified a

2. In its appellate briefs, BMW NA has continued to cite to that evidence ruled inadmissible by the district court but has failed to challenge those rulings. We will, therefore, review the evidence as confined by those orders.

controlling question of law concerning standing to sue under the Board of Vehicles Act, and we subsequently granted BMW NA permission to appeal the denial of summary judgment on that claim pursuant to 28 U.S.C. § 1292(b). This appeal and cross-appeal followed.

The district court exercised federal subject matter jurisdiction over the Sherman Act claim and pendent jurisdiction over the state law claims. Our standard of review is plenary. *Goodman v. Mead Johnson & Co.*, 534 F.2d 566, 573 (3d Cir. 1976), *cert. denied*, 429 U.S. 1038 (1977). We review the dismissal of the pendent state claims utilizing an abuse of discretion standard. *Cooley v. Pennsylvania Housing Finance Agency*, 830 F.2d 469 (3d Cir. 1987).

II.

A.

As the district court accurately stated in its unpublished Memorandum Opinion, "[t]he narrow issue upon which decision turns is whether plaintiffs have enough evidence to get to a jury on the issue of concerted action." *Id.* at 5. The district court first concluded that the Potamkins had failed to produce direct evidence that BMW dealers opposed the Potamkins as dealers, complained to BMW NA about the Potamkins, or that BMW NA's decisions were responsive to dealer complaints. *Id.* at 6. The district court then evaluated "19 bits of evidence which, [the Potamkins] argue, support . . . an inference [of the requisite concerted action]."[3] *Id.* After considering each of the "19 bits"

3. These "19 bits" of evidence are listed *infra* at footnote 11.

individually, the district court concluded that it was "left with the reasonably firm conviction that, while the evidence does not rule out the possibility that the defendant's rejections of plaintiffs' applications were the product of concerted action between defendant and one or more of its dealers, there is simply no proof of concerted action sufficient to withstand a motion for summary judgment." *Id.* at 15.

B.

Summary judgment should be granted where no genuine issue of material fact exists for resolution at trial and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). It is no longer a disfavored procedural shortcut, and may present the district court with the first opportunity to dispose of meritless cases under the federal practice of notice pleading. *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986). This is true even in antitrust cases, "where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot," *Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464, 473 (1962); *see Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574 (1986); *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752 (1984); *Edward J. Sweeney & Sons, Inc. v. Texaco, Inc.*, 637 F.2d 105 (3d Cir. 1980), *cert. denied*, 451 U.S. 911 (1981); *Fragale & Sons Beverage Co. v. Dill*, 760 F.2d 469 (3d. Cir. 1985).

The summary judgment standard has been likened to the "reasonable jury" directed verdict standard. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251 (1986). The moving party need not

produce evidence to disprove the opponent's claim, *Celotex*, 477 U.S. at 323, but does carry the burden to demonstrate the absence of any genuine issues of material fact. If the movant has produced evidence in support of summary judgment, then the opponent may not rest on the allegations set forth in its pleadings but must counter with evidence that demonstrates a genuine issue of fact. Fed. R. Civ. P. 56(e). This, in turn, requires the opponent to "set forth specific facts showing that there is a genuine issue for trial." *Id.*

When deciding a motion for summary judgment, nonetheless, a court's role remains circumscribed in that it is inappropriate for a court to resolve factual disputes and to make credibility determinations. *Country Floors*, 930 F.2d at 1061. Thus an opponent may not prevail merely by discrediting the credibility of the movant's evidence; it must produce some affirmative evidence. *Anderson*, 477 U.S. at 256-57. Inferences should be drawn in the light most favorable to the non-moving party, and where the non-moving party's evidence contradicts the movant's, then the non-movant's must be taken as true. *Country Floors*, 534 F.2d at 1061 (citing *Goodman v. Mead Johnson & Co.*, 534 F.2d at 573).

This trial "on paper" differs from a trial before a jury in one significant detail: "at the summary judgment stage the judge's function is not . . . to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Anderson*, 477 U.S. at 249. This does not require a court to turn a blind eye to the weight of the evidence; the "opponent must do more than simply show that there is some metaphysical doubt as to the material facts."

Matsushita, 475 U.S. at 586. To raise a genuine issue of material fact, however, the opponent need not match, item for item, each piece of evidence proffered by the movant. In practical terms, if the opponent has exceeded the "mere scintilla" threshold and has offered a genuine issue of material fact, then the court cannot credit the movant's version of events against the opponent, even if the quantity of the movant's evidence far outweighs that of its opponent. It thus remains the province of the factfinder to ascertain the believability and weight of the evidence.

A non-movant's burden in defending against summary judgment in an antitrust case is no different than in any other case. As was recently clarified by the Supreme Court:

> The Court's requirement in *Matsushita* that the plaintiffs' claims make economic sense did not introduce a special burden on plaintiffs facing summary judgment in antitrust cases. The Court did not hold if the moving party enunciates *any* economic theory supporting its behavior, regardless of its accuracy in reflecting the actual market, it is entitled to summary judgment. *Matsushita* demands only that the nonmoving party's inferences be reasonable in order to reach the jury, a requirement that was not invented, but merely articulated, in that decision. If the plaintiffs theory is economically senseless, no reasonable jury could find in its favor, and summary judgment should be granted.

Eastman Kodak Co. v. Image Technical Services, 60 U.S.L.W. 4465, 4470 (June 8, 1992)(footnote omitted).

Therefore, in the summary judgment context, "inferences to be drawn from the underlying facts must be viewed in the light most favorable to the opposing party." *Matsushita*, 475 U.S. at 587. These inferences, however, when drawn from ambiguous evidence, are circumscribed in antitrust cases because a fine line demarcates concerted action that violates antitrust law from legitimate business practices. *See Monsanto*, 465 U.S. at 762-64. Care must be taken to ensure that inferences of unlawful activity drawn from ambiguous evidence do not infringe upon the defendant's freedom, so long as it acts independently, to refuse to deal, *United States v. Colgate & Co.*, 250 U.S. 300 (1919), or to impose vertical non-price restraints, *Continental T. V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977). Nevertheless, the summary judgment movant must show that an inference of concerted action to exclude competition from evidence of BMW NA's inconsistent behavior and dealer complaints is unreasonable. *See Eastman Kodak*, 60 U.S.L.W. at 4470.

C.

Of course, in ruling upon a motion for summary judgment, a court must evaluate the material facts against the substantive proof required of the plaintiff. For a section 1 claim under the Sherman Act, a plaintiff must prove "concerted action," a collective reference to the "'contract . . . combination or conspiracy.'" *Bogosian v. Gulf Oil Corp*, 561 F.2d 434, 445-45 (3d Cir. 1977), *cert. denied*, 434 U.S. 1086 (1978); *see Edward J. Sweeney*, 637 F.2d at 111. If, as BMW NA asserts, it acted independently in denying the Potamkins a

franchise, no antitrust liability would attach. *Colgate*, 250 U.S. 307. Moreover, the inferences of concerted action that may be drawn from circumstantial evidence in antitrust cases is circumscribed. Thus an antitrust plaintiff must be prepared to demonstrate a causal relationship between alleged dealer complaints *and* a distributor's action in order to show that the concerted action in violation of the Sherman Act is distinguishable from "perfectly legitimate" independent conduct. *See Monsanto*, 465 U.S. at 763-64.

In that regard, proof of causation requires more than a sequence of dealer complaints to a distributor that are followed by the distributor's conduct alleged to violate antitrust laws. *Edward J. Sweeney*, 637 F.2d at 111-15. A jury may not be permitted to speculate as to cause from a chain of events, *id.* at 111; the plaintiff must demonstrate adequately "'a unity of purpose or a common design and understanding, or a meeting of the minds.'" *Id.* (*quoting American Tobacco Co. v. United States*, 328 U.S. 781, 810 (1946)).

As the Supreme Court admonished in *Monsanto*, we ought not to permit an inference of an agreement in violation of the Sherman Act to arise merely from "the fact that termination came about 'in response to' complaints." 465 U.S. at 763. Permitting such an inference could "deter or penalize perfectly legitimate conduct"; non-price restrictions may simply reflect normal business conditions which do not raise the specter of concerted action. Moreover, dealers are often important sources of information for distributors or manufacturers and these sources should not be

restricted by impractical antitrust prohibitions. *See id.* at 763-64.

In *Monsanto*, the Court ruled that *more* than mere complaints of concerted action were necessary to defeat the motion for summary judgment. Accordingly, "[t]here must be evidence that tends to exclude the possibility that the manufacturer and nonterminated distributors were acting independently." 465 U.S. at 764. "[T]he antitrust plaintiff should present direct or circumstantial evidence that reasonably tends to prove that the manufacturer and others 'had a conscious commitment to a common scheme designed to achieve an unlawful objective.'" *Id.* (citing *Edward J. Sweeney*, 637 F.2d at 111).

Monsanto does not require that a plaintiff provide *direct* evidence of a causal relationship; concerted action may be inferred from circumstantial evidence. *See id.* 764, 768. That evidence should be analyzed as a whole, rather than compartmentalized, to determine whether it supports an inference of concerted action. *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690 (1962). In *Continental Ore*, the Court admonished federal courts not to "approach [antitrust] claims as if they were . . . completely separate and unrelated lawsuits." *Id.* at 698.

> In cases such as this, plaintiffs should be given the full benefit of their proof without tightly compartmentalizing the various factual components and wiping the slate clean after scrutiny of each. . . . [T]he duty of the jury was to look at the whole picture and not merely at the individual figures in it.

370 U.S. at 699.

We utilized this approach in *Arnold Pontiac-GMC, Inc. v. General Motors Corp.*, 786 F.2d 564 (3d Cir. 1986), in which the plaintiff asserted that GM and its dealers conspired to deny the plaintiff a franchise in violation of section 1 of the Sherman Act. There we found sufficient to withstand summary judgment the evidence that GM had favorably viewed Arnold Pontiac's franchise application until after the GM dealers' collectively expressed disapproval and threatened non-cooperation. *Id.* at 573-74. Arnold Pontiac had met the *Monsanto* standard, specifically that the conduct of the dealers constituted sufficient evidence that "tends to exclude the possibility that [GMC acted] independently." *Id.* at 574 (quoting *Monsanto*). We concluded that a reasonable inference of concerted action could be drawn from the whole of the evidence and remanded the case for trial. *Id.*

Here, the Potamkins assert, and we agree, that the district court inappropriately compartmentalized their evidence and drew inferences in favor of BMW NA rather than in their favor. They argue that the district court's holding, in effect, would require that to successfully defend against summary judgment, they must produce evidence sufficient to prevail upon their own motion for summary judgment. In essence, the Potamkins urge, and we agree, that in defending against summary judgment, they need not "eliminate all possible 'independent' justifications by the manufacturer, [so that] *only* evidence of concerted action would be left in the record." They need, rather, to produce "evidence that tends to exclude the possibility of independent action." *Monsanto*, 465 U.S. at 768.

Appendix A

According to the Potamkins, *Monsanto* cannot be read to require an opponent of summary judgment to produce the same quantum and kind of evidence it would need to affirmatively make its own motion for summary judgment. Thus, the Potamkins urge that a reading of *Monsanto* that requires them to affirmatively disprove any legitimate reasons for BMW NA's actions would be inconsistent with the burden of proof required for a non-movant to defeat a summary judgment motion. In this case, that consideration is especially germane because the quantity of the Potamkins' evidence is outweighed by the quantity of BMW NA's evidence. BMW NA primarily contends that summary judgment is appropriate because "there [is] no evidence to establish that BMW dealers were opposed to appellants' efforts to obtain franchises, or that any BMW dealers complained to BMW NA about [the Potamkins], or that BMW NA's refusal to appoint [the Potamkins] as dealers was in response to dealer complaints." With the foregoing orientation, we now turn to review the evidence presented in this case.

III.

The Potamkins have produced evidence of concerted action spanning several years and three locations. For the sake of clarity, we will order the evidence according to the location in which the Potamkins sought a particular franchise. There is consistent evidence that BMW NA encouraged the Potamkins to acquire BMW dealerships, that the New York and Philadelphia dealers subsequently complained to BMW NA about the Potamkins, and that BMW NA later denied the Potamkins franchises giving allegedly pretextual reasons.

Appendix A

A.

1981: Great Neck

In 1980, Victor Potamkin initiated negotiations with BMW NA for a franchise by writing to BMW's German manufacturer. A1463. In response, Terry Cronin, BMW NA's Eastern Regional Manager, sent the following correspondence to Victor in November of 1980:

> Obviously, because I reside and work in the New York Metro area, I am personally well aware of your status as a proven and successful automobile executive. Dealerization for the northeast portion of the United States comes under the responsibility of the Eastern region. I would be very happy to meet with you at your convenience to discuss whatever mutual opportunities may exist between yourself and BMWNA.

A1464.

Accordingly, Victor and Cronin met on approximately four or five occasions. Cronin testified in his deposition that following initial meetings, also attended by Andrew Pokorny, BMW NA's Vice President of Sales, A1487-88, 1507-09, he "was favorably impressed with Victor" as an individual, although Cronin shied away from opining as to Victor's suitability for a dealership at that time. A1491-92. These meetings focused upon available "open points."[4] As one basis for its termination of negotiations, BMW NA contends that Victor's interests lay not in the Great Neck

4. An "open point" is a location for which a new franchise is slated in contrast with a "buy-sell" situation in which a new dealer replaces a retiring one.

open point that BMW NA sought to fill, but in Atlanta and Miami, A1489-90, or North Plainfield, New Jersey. A1501. Cronin testified, but Victor denies, that Victor was primarily interested in a North Plainfield, New Jersey, franchise rather than one in Great Neck, New York. A261; A645.

However, despite inquiries about other locations, BMW NA does not dispute, and Cronin testified, that Victor located a facility in Great Neck. A1495-96. Cronin, who visited that facility, A1496-97, testified that "It probably needed a great deal of renovation. But I believe it could have been suitable for BMW." A1498. Cronin also testified that the Potamkins envisioned this as an exclusively BMW franchise and may have anticipated selling as many as 500 cars annually. A1500.

Negotiations proceeded apace as Cronin subsequently met with Robert and Alan Potamkin at BMW NA's eastern regional office, to review a "pro forma facility investment analysis" during the summer of 1981. A1499, 1508. At the conclusion of this meeting, Cronin was still interested in the Potamkins' pursuit of the Great Neck point, A1503, and Robert and Alan were expected to report back to Victor and contact BMW NA if they were still interested. It remains Victor's belief that during these negotiations he and BMW NA reached an oral agreement on the Great Neck BMW franchise. A645.

Later, during that fall, Cronin again met with Victor at the "21 Club" in Manhattan, where, Cronin testified, they discussed the viability of BMW in Great Neck over lunch and Victor again allegedly inquired about North Plainfield. A1509. Afterward, in Victor's limousine, BMW NA alleges

that Victor attempted to bribe Cronin for a North Plainfield location. Cronin testified: ". . . [H]e said to me that North Plainfield was very important to him; that it would be worth a lot of money to him, $25,000, if he were awarded the North Plainfield point." A1510. Cronin immediately returned to his office and telephoned Gordon Bingham, then-Vice President of Operations and Jack Cook, then-President of BMW NA, to report the alleged bribe. A1513-14; A1522-23. Pursuant to Cook's instructions, Cronin did not tell anyone else of this incident, nor did he document it. A1523-1526. It is not disputed that others at BMW NA became aware of the alleged bribe.

By letter dated November 4, 1981, from Cronin, Victor learned:

> After much deliberation, we have decided that the appointment of a BMW dealer in Great Neck, at this time, would not be the proper long range solution to our long standing problem. In lieu of an appointment, we have opted to work with our existing dealer body to improve the overall representation of BMW on the Northshore of Long Island.

A1203.

In support of their allegation of concerted action, the Potamkins have produced the affidavit of Harry Gray. In 1981, Gray served as a Long Island BMW dealer and a member of the area Dealer Advertising Group ("DAG"). Dealer Advertising Groups are composed of regional dealers who meet regularly with BMW NA representatives to coordinate advertising strategy. A1854-55;

Appendix A

. In his affidavit, Gray reported dealer opposition to a Potamkin franchise featured at a DAG meeting:

> 2. Great Neck, Long Island, was a BMW "open point" during the early 1980's. I knew that BMW had expressed interest in having Victor Potamkin as a franchised dealer at that location.
>
> 3. At that time, I recall attending a BMW Dealer Advertising Group ("DAG") meeting with other BMW dealers from the New York area and with BMW employees. I recall specifically that the dealer principals for BMW dealerships in Brooklyn, New York, Jamaica, New York, Smithtown, New York and Inwood, New York were present. There were other BMW dealers present as well.
>
> 4. There was a discussion among the BMW dealers about the possibility of Victor Potamkin obtaining the Great Neck, BMW open point.
>
> 5. The dealers opposed BMW granting Victor Potamkin a BMW franchise. The dealers feared that Mr. Potamkin would take away significant business from them, and would "alter the competitive landscape", as I believe one dealer expressed it.
>
> 6. The dealers understood and expressed that Mr. Potamkin's Great Neck dealership had already been approved at the level of BMW's central office, in Montvale, New Jersey. However, *the central office had decided to leave the final decision to the regional office for the BMW Eastern region*, which region included all of the New York-area dealerships.

Appendix A

> 7. *BMW dealers at the meeting said they had already spoken to Terry Cronin, the BMW Regional Manager for the Eastern region,* opposing Mr. Potamkin's BMW franchise appointment, *and that they would continue to speak to him on this subject,* since the dealers understood that Mr. Cronin had significant input on this matter.
>
> 8. I subsequently came to understand that Terry Cronin had opposed this appointment, which I concluded was in response to the New York-area BMW dealers' objections.

A1541-43 (emphasis added).

Assuming that Gray's trial testimony would be consistent with his affidavit, the district court ruled it inadmissible, reasoning that Gray's testimony would not establish a conspiracy between BMW NA and the New York area dealers. Specifically, the district court found that Gray's affidavit did not establish that dealer opposition had been communicated to BMW NA nor that BMW had acted in response to dealer complaints. Memorandum Opinion at 8. Therefore, the district court ruled that Gray's conclusion of causation constituted "[t]hat kind of unfounded speculation [that] would not be admissible at trial, and does not prove anything." *Id.*

The Potamkins argue that the affidavit itself evidences communication of dealer opposition to BMW NA because Gray states first, that Cronin possessed authority to approve Victor for the Great Neck point; second, that some of the DAG members had communicated their opposition to Cronin; and third, at the meeting they expressed

an intent to continue to communicate to Cronin their opposition.

The record also supports this first proposition: prior to Michael Jackling's installation as BMW NA's Vice President, Director of Operations in October of 1985, BMW dealership appointments were largely relegated to the regional offices. A2378. While there is little in the record to flesh out the details of the pre-Jackling era dealer appointment procedure, a jury could reasonably infer, from the evidence that Jackling confined post-1985 decisions to BMW NA's Montvale headquarters, that regional representatives wielded a significant amount of power over appointments prior to 1985.

[5] Thus the third proposition, according to the Potamkins, would be supported by Gray's testimony of concerted action on behalf of the New York area dealership body with BMW NA to reject Victor's appointment as a price competitor. BMW NA accurately notes that, as factual matters, the Gray affidavit does not even identify Cronin as one of the unnamed BMW NA employees present at that DAG meeting. Nor does it contain evidence that BMW NA considered the alleged dealers' demands. This factual argument, however, properly belongs in front of a jury. That Gray's affidavit is not a proverbial smoking gun does not make it inadmissible.

As a legal matter, BMW NA suggests that the Gray affidavit is inadmissible because it allegedly contains only Gray's surmise of causation and

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5.

lacks the requisite personal knowledge required by Fed. R. Civ. P. 56(e). In this respect, BMW NA cites *Edward J. Sweeney, Inc.*, in which we held, in part, that the plaintiff had failed to meet its burden to prove concerted action, when defending against summary judgment. 637 F.2d at 116-17. Significantly, in that case we did not rule that evidence of concerted action inadmissible, but simply insufficient to sustain the plaintiff's burden of proof. This case, as distinguished from *Edward J. Sweeney*, presents more evidence than a witness's "general feeling," 637 F.2d at 114, and another witness's "'belief . . . without factual basis," 637 F.2d at 112. *See also Mid-South Grizzlies v. National Football League*, 550 F. Supp. 558 (E.D. Pa. 1982) (finding a statement that some people opined that the applicant's past WFL affiliation would hurt its chances of obtaining an NFL affiliation was insufficient to prove retaliation, in part because the witness admitted these views were personal to the speakers and did not represent the NFL's position), *aff'd*, 720 F.2d 772 (3d Cir. 1983), *cert. denied*, 467 U.S. 1215 (1984).

In addition, we noted in *Edward J. Sweeney* that "absent some evidence supporting appellant's theory, we will not assume [that the defense witness] lied about his [legitimate] reasons." 637 F.2d at 113. By contrast, Gray's affidavit, combined with the segment of a 1978 BMW "Policy and Procedure Manual for Dealer Development," indicates that Cronin was given decision-making authority and that area dealers had voiced to Cronin, and intended to continue to voice, their opposition to a Potamkin franchise. The fact that Cronin has categorically refuted any dealership pressure or discussions with dealers concerning

Victor's interest in a BMW franchise does not serve to render Gray's affidavit inadmissible, but simply creates a material fact for the jury to resolve. *See* A265.

The Potamkins do not request that we simply discredit the testimony of BMW NA's witnesses in order to deny summary judgment. Rather, they have proffered significant, albeit circumstantial, evidence to counter this evidence. For example, Robert alleges that one New Jersey BMW dealer, Gene Hoffman, revealed to him in late 1985 that "BMWNA's decision in 1981-82 not to give the Potamkins a BMW franchise in Great Neck, Long Island was due to the fact that other Long Island BMW dealers feared the price competition that a Potamkin BMW franchise would bring to the Long Island market." A1712. Hoffman has testified inconsistently that 1) he cannot recall the substantive content of his conversations with Robert and 2) he denies Robert's allegations. A417-18. Reasonable inferences of concerted action may be drawn from the Gray affidavit combined with Hoffman's comments, BMW NA's alleged abrupt reversal of opinion, and, as will be seen below, Cronin's solicitation of Robert even after the alleged bribe attempt.

Unlike the plaintiff in *Edward J. Sweeney*, who failed to disprove the defendant's legitimate reasons, the Potamkins have produced evidence that tends to negate BMW NA's allegation of the attempted bribe. BMW NA has not explained why, if the bribe incident occurred, later in 1982 Cronin suggested to Robert Potamkin that he purchase Irv Green's franchise as Robert alleges. A1704.[6] The

6. BMW NA's response at appellate oral argument to the

absence of any BMW NA documentation of the bribe and Cronin's November 1981 letter to Victor evidencing different concerns further serves to buttress an inference that this alleged bribe may have been conjured up later. The Potamkins point out that Victor and Gunter Kramer, BMW NA's President, had a cordial lunch together in 1983, A1460; 2171, although Kramer responds that, new to his position at that time, he had not yet been informed of the bribe. A484-86.

Given this sequence of events, a reasonable jury could infer that BMW NA would have welcomed a "high volume" dealer such as Victor, and after succumbing to pressure from its New York area dealers, entertained the prospect of installing a Potamkin dealership in an alternative location, Philadelphia.

B.

1985: Manhattan

In early September of 1985, the Potamkins[7] began negotiating with Gladys Caufield and her

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apparent inconsistency between Cronin's outrage in 1981 at the alleged bribe and his solicitation of Robert's application in 1982 is two-fold: (1) Robert's recollection of the 1982 date is inaccurate, or (2) Cronin had no responsibility for the Philadelphia territory. The first explanation clearly raises an issue of credibility for the jury. The second explanation is not borne out by the record. Prior to 1985, when the Mid-Atlantic Region was first formed, Cronin served the Eastern Region which encompassed Philadelphia. *See* A1853. Moreover, Green's testimony shows that Cronin supervised his dealership. *See* A1769.

7. Gladys Caufield testified that she believed that she and her lawyer, Marvin Buchner, negotiated with all three of the Potamkins, A1663, because she met with all three at one time.

lawyer, Marvin Buchner, in order to purchase Caufield's Manhattan BMW dealership, Trans-Atlantic. Caufield explained that she had sought to sell her business to the Potamkins because ". . . it just made more sense . . . you know, they had the wherewithal to really do a beautiful job and I thought that's what BMW was looking for." A1662-63. Because her lease was expiring, she was compelled to sell the business by the end of December of 1985. A1612-1614. At a September 9th meeting, the Potamkins offered to buy Trans-Atlantic for $800,000 plus an undetermined amount for parts. A1620. On September 30th, Cronin spoke to Buchner, and urged that Caufield stall the Potamkin deal so that BMW NA could make an offer by October 10th. A1673.

Having heard nothing from BMW NA, Buchner unsuccessfully attempted to reach Cronin on October 16th. A1674. Subsequently, the Potamkins and Caufield reached an "agreement in principle" on October 29, 1985, subject to successfully negotiating a written sales agreement. A1632, A1674. BMW NA again stepped into the picture the next day, on October 30th, when Cronin and Andy Pokorny of BMW NA met with Buchner, Caufield and her partner at Trans-Atlantic. A1633. Buchner testified that Cronin advised them "that BMW would not accept Potamkin as a dealer" and "BMW wanted Manhattan to be a one-dealer territory" and they should "delay signing an agreement with Potamkin until BMW could make

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Moreover, Buchner initially contacted one of Victor's salesmen to inquire into the Potamkins' interest in Trans-Atlantic. A1621.

its offer to Trans-Atlantic." A1633. Buchner believed that BMW's opposition to the Potamkins was related to discounting and reputation for service. A1634.

Informing them of the agreement in principle, A1634-35, Buchner countered that if a signed agreement was submitted to BMW for approval and was rejected, it would precipitate litigation by Trans-Atlantic and probably Potamkin against BMW. A1633. The following day, October 31st, BMW NA's counsel, Michael Epstein from Weil, Gotshal & Manges, contacted Buchner and asked to see the agreement with the Potamkins; Buchner refused and the two agreed to a November 5th deadline for a BMW NA offer. A1635-36. On November 7th, Caufield, her partner, and Buchner met with BMW NA's Vice President Michael Jackling and Michael Epstein and Arthur Jacobs of Weil, Gotshal & Manges. A1639.

After reviewing the Potamkin negotiations, BMW NA offered Caufield $500,000 plus repurchasing assets as required under the franchise agreement. A1640. No agreement was reached, but Jackling did indicate that BMW NA would not award a franchise to the Potamkins because, as Buchner recalled, it was "the tenor of his comment that they were price discounters." A1641. In response to a counteroffer based on the price the Potamkins were willing to pay, BMW NA's counsel "indicated to [Buchner] that the position of BMW was that these premises were closing down and that we really had nothing to sell, they had nothing to buy." A1642.

Buchner then called the Potamkins' lawyer and explained that Caufield would not sign that agreement until the Potamkins could provide a

possession date. A1643. Nothing happened until December 17th, when Jacobs offered Buchner BMW NA's top offer of $550,000,[8] and Caufield, pressed by an expiring lease, accepted. A1644. Buchner explained that "BMW, through Mr. Cronin, had made it crystal clear that they would not approve the Potamkin people; therefore, our choices of purchasers was limited to one and my instructions were to strike the best deal I could with BMW and close it." A1645. Caufield stated, "I think they indicated clearly that if we went ahead with the sale to Potamkin that we would be in litigation for a long period of time." ". . . [A]nd if we were in some kind of litigation I had parts and cars and whatever that would be tied up and it was sort of forcing the hand, so to speak." A1665.

BMW NA counters that it had long planned to eliminate one of its two Manhattan dealerships because New York is widely considered to be a one-dealer market, according to Cronin, and BMW NA already had an additional New York City dealership, Martin BMW. A296-97. Caufield testified that in 1984, BMW NA had once mentioned the possibility of buying Trans-Atlantic and turning it into a factory store or mausoleum, although no terms or prices were reached. A1655-56; 303-07. This was consistent with BMW NA's earlier plan for its Manhattan dealers, dubbed the "Manhattan Project," which envisioned eliminating the two Manhattan BMW dealerships by buying them out and then opening a factory store or mausoleum. A873-75; 298. For this

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8. BMW NA ultimately paid $693,569 for Trans-Atlantic, inclusive of parts. A1649.

reason, BMW NA suggests that Caufield's negotiations with the Potamkins were merely an attempt to obtain a valuation of her business. A305; A1335-38.

Following BMW NA's purchase of Trans-Atlantic's assets, however, it deviated from the "Manhattan Project", granting to Martin BMW an exclusive Manhattan franchise. BMW NA alleges it chose this course because it came to see the wisdom of not engaging in competition with its dealers.

Nevertheless, Robert asserts that one BMW dealer, Hoffman, later informed him that a BMW NA representative had "visited him and asked his opinion" about the proposed sale of Trans-Atlantic to the Potamkins. A1712. During BMW NA's negotiations with the principal of Martin BMW – prior to the Caufield/Potamkin negotiations – a Cronin memorandum anticipated the need to discuss with the area dealers the operation of a factory store. A2227; A873-75. The Potamkins theorize that the dealer opposition of 1981 was reactivated in 1985 to defeat their agreement in principle with Caufield for Trans-Atlantic and to award Martin BMW an exclusive Manhattan dealership.

C.

1985: Philadelphia

Also during the fall of 1985, Robert and Alan Potamkin reached a written buy-sell agreement with Philadelphia BMW dealer Irvin Green, but once again fell short of acquiring a BMW franchise. Because this third attempt constitutes the heart of the Potamkins' lawsuit and BMW NA presents a multitude of reasons for its decision to reject

Robert's franchise application, an especially detailed review is required.

Robert alleges that Cronin approached him in 1982 about acquiring the Philadelphia franchise owned by Irvin Green. Green conceded that BMW NA, particularly Cronin, had long been dissatisfied with his meager sales performance

Therefore, on October 8, 1985, Green and Robert entered into a buy-sell agreement for Green's BMW and Volkswagen franchises. A929-47. Robert, as half owner, would manage the dealership; Alan and another investor were each to contribute 25% of the capital. The Potamkins planned to move these franchises to a different location in Northeast Philadelphia, at the corner of Grant Avenue and Academy Road, which also housed Robert's Chevrolet, Dodge, Isuzu, and AMC Jeep Renault franchises. A595; A2065.

The buy-sell agreement was expressly contingent upon the award of BMW and Volkswagen franchises, and contained an expiration date of December 23, 1985. A1729-30. This expiration date, combined with BMW NA's alleged delay in delivering a franchise application to Robert, forms a significant part of the Potamkins' grievance with BMW NA. Although Green and Robert each sought to obtain a BMW franchise application immediately after signing their agreement, the Potamkins assert that BMW NA delayed sending the necessary application form until October 29, 1985. BMW NA was required to act on Robert's application under the Pennsylvania Board of Vehicles Act, 63 Pa. Stat. Ann. § 818.9(b)(4), within 60 days. By delaying until October 29th, BMW NA ensured that this deadline would exceed the December 23rd

expiration of the buy-sell agreement.[9] By letter to Irv Green dated November 25, 1985, Michael

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9. There is significant dispute concerning whether BMW NA made a good faith attempt to consider Robert's application. According to Robert's affidavit, by October 10th Green hand-delivered the buy-sell agreement to Philip Caposecla, then the BMW Regional Manager for the mid-Atlantic Region and requested a dealership application form which Caposecla refused to provide. A1706. Caposecla testified that he was thus aware of the expiration date, A103, and that at that time he told Green that Robert was not a "suitable" candidate for a franchise, in the words of BMW NA in-house counsel. A105-106. Robert telephoned Caposecla and offered personally to travel to his Virginia office to obtain an application, but was told that the district manager would provide Robert with a copy and that he, Caposecla, would contact Robert by October 16th. A1706-07. Robert was unable to reach Caposecla again, but sent a letter, dated October 18th, A1716, and contacted Robert Casella, BMW Director of Dealer Development for the mid-Atlantic Region, on October 22, 1985, who again discouraged Robert from traveling to Virginia to obtain an application form. A1707. Casella agreed to meet with Robert on October 29th and to supply a form at that time. Robert then wrote a follow-up letter, A1717; Casella refutes Robert's recordation that Casella gave him assurances that there would be sufficient time to process the application before the expiration of the buy-sell agreement. A147; *see also* A1205-06 (Casella's "Inter-branch Memo" of the incident).

BMW NA provides a host of reasons for failing to decide on the application until after the agreement expired. It hints that

and that field personnel could not have taken the application before October 29th and 30th. BMW NA also suggests that Irv Green did not properly tender notice of the alleged buy-sell agreement. Thus, Caposecla testified that Green needed to enclose a cover letter to introduce the buy-sell agreement, and his personal delivery of the buy-sell agreement to BMW NA was insufficient notice. A1756.

Jackling, at that time BMW NA's Senior Vice President of Operations, explicitly acknowledged this deadline.[10] A1746.

Indeed Jackling asserted that Robert's application was incomplete, and the buy-sell agreement expired of its own accord. A2415-16. The record does not indicate why, if the application package was incomplete, Jackling directed counsel at Weil, Gotshal to hire a private investigator to investigate Robert pursuant to the application, nor why other processing steps were taken.

And Casella explained that an application is pending from the "time the [acquisition agreement] hits my desk." A1814.

Although District Parts Manager Graynor indicated that Robert and his proposed parts manager had refused to sign the Prospective Dealer Parts Department form, A2017, Robert contends they were never shown that form. A1974. Another BMW dealer, Martin Sussman, had refused to sign a BMW Dealer Operating Requirement Agreement because he disagreed with one of its conditions, but had not been threatened with termination of his franchise. A2141-44.

10. In relevant part, Jackling wrote:

> I am informed that Pennsylvania law allows BMWNA to respond to a request for consent to the sale of a franchise "within 60 days of receipt of a *written request* on the forms, if any, generally utilized by the manufacturer or distributor for such purposes and containing the information required."
>
> At your October 10, 1985 meeting with Mr. Capossela, BMWNA was not provided with a written request or with the information we require in order to evaluate your potential purchaser. Mr. Potamkin submitted his application package on October 29. The following day, October 30, we received your written request for consent.
>
> By statute, BMWNA's 60 days to evaluate the proposed sale of a franchise cannot expire on a Saturday or

As a result of this posturing, Andrew Pokorny, BMW NA's Vice President of Regional Operations and Sales, A289, sent to Irv Green a letter dated December 26, 1985, informing him that it would not award Robert Potamkin a franchise. By this time, the executory contract had already expired. Ultimately, Green sold his BMW franchise to an existing area BMW dealer, Robert Sloane, and his partner, Martin Lustgarten, who relocated the franchise to an affluent Philadelphia suburb.

The Potamkins allege that they were denied the Green franchise because Philadelphia area BMW dealers feared price competition and coalesced to pressure BMW NA into rejecting their application. As proof, they tender the testimony of Bruce Braverman, Robert's Lease Manager. This evidence consists of statements allegedly made by a BMW leasing representative, Don Mitchell, to Braverman. Braverman testified in his deposition that:

> Don Mitchell told me that the BMW dealers in the area would not let Potamkin get the franchise because they were afraid that Potamkin's reputation of selling cars cheaper than everybody else was not something that they wanted to get involved with. They didn't want to be involved in price competition. They wanted to keep their price levels where they were and that they were going to do what they could to make sure that Potamkin did not get the franchise.

A2195-96. In answer to the question "Did Mitchell indicate that he had spoken to anyone from BMW of North America?," Braverman also stated:

Sunday. Consequently, whether we count from October 29 or from October 30, BMWNA's deadline is Monday, December 30, 1985.

> No. He indicated to me that he had spoken to dealers. The dealers, it was the dealers who did not want Potamkin to get the franchise, it wasn't BMW who had rejected them.
>
> To me it seemed like it was a conspiracy of the dealers in the tri-state area that didn't want Potamkin to get that franchise. I don't think BMW cared.

A2312. However, Braverman also answered negatively when asked, "Did Mr. Mitchell indicate that the dealers had specifically spoken to a particular individual at BMW?" A2312. Braverman memorialized this alleged conversation in a memorandum dated January 15, 1986. A2197. While this testimony also falls short of direct "smoking gun" evidence of causation, if admissible, it does supply additional circumstantial evidence of concerted action.

In excluding this evidence, the district court reasoned that Mitchell's statement would constitute hearsay unless he possessed authority to bind BMW NA, which he indisputably lacked. This conclusion misperceives the nature of a vicarious admission, which the Federal Rules of Evidence designate as outside the realm of hearsay by definition. Further, the vicarious admission rule of Federal Rule of Evidence 801(d)(2)(D) does not require that a declarant have authority to bind its employer. As the Advisory Committee noted when amending this rule, to limit its scope in this manner would preclude much probative evidence because an employer will rarely authorize its employee to make incriminating statements. Advisory Committee Note to Fed. R. Evid. 801(d)(2)(D). The rule simply requires that an

agent make the statement "within the scope of" his or her employment.

To analyze the relevant scope of Mitchell's employment, we must first identify his employer. Braverman testified that Mitchell was BMW Credit's representative to Robert's prospective dealership. A2194-95. Yet according to BMW NA, Don Mitchell was employed by General Electric Capital Auto Lease (GECAL) as an area sales manager. A2426. Mitchell testified that he received his salary from GECAL without commissions from BMW Credit. A506.

The relationship between Mitchell's employer, GECAL and BMW NA is complex.

As far as the record discloses, Mitchell was the only representative of BMW Credit and BMW Leasing assigned to serve the territory in which Robert's proposed dealership was located. Mitchell described his job function as "solicit[ing] leasing business from automobile dealerships and independent leasing companies within [his territory]." Pursuant to the GECC and BMW NA joint ventures, his job included some retail installment financing. A2427; He also "provide[d] the BMW dealers with help on their leases and promotions," A2434, and provided BMW dealers with training and the necessary supplies to complete the leasing and financing paperwork. A2846. As the leasing agent for GECAL to BMW dealerships, he admitted, "I represent BMW Credit Corporation." A2872.

We conclude that Mitchell's statement, made as a representative of BMW Credit and BMW Leasing, may be attributed to BMW NA. The statement of a subsidiary may be attributed to its corporate parent, consistent with agency theory, where the

parent dominates the activities of the subsidiary. *See Zenith Radio Corp. v. Matsushita Elec. Indus. Co. Ltd.*, 505 F. Supp. 1190, 1247-48 (E.D. Pa. 1980). This evidence of the relationship between BMW NA and BMW Credit and BMW Leasing, while close, does suffice to confer agency status on Mitchell. BMW NA's ownership interests, control through corporate officers, advertising, and the subsidiaries' use of the BMW logo on their documentation, together indicate a sufficiently dominating interest in its subsidiaries.

As a further matter, the identity of the dealers referred to is sufficiently clear from the record. BMW NA's District Manager Martin Focht identified the members of the Philadelphia area dealer advertising group (DAG) as consisting of the following dealerships: Rosen, Otto's, Devon Hill, Sloane, DeSimone, Martin, Union Park, Thompson, Hans, and West German. A1854. Mitchell specified servicing the following BMW dealerships from September 1985 through January 1986: Rosen, Otto's, Devon Hill, Thompson, Hans and West German. A2201-02. Braverman's account of Mitchell's statement conveys that Rosen referred to the area dealers, which would fairly comprise the area DAG. The evidence sufficiently identifies the source of the dealers' statements. *Contra Carden v. Westinghouse Elec. Co.*, 850 F.2d 996, 1002 (3d Cir. 1988) (an unidentified "they," who said something to the declarant, was insufficient).

The district court noted, as its second reason, that Mitchell was alleged to have made the statement "some two weeks *after*" BMW NA rejected Robert's application. We reject the theory that a statement evidencing the occurrence of concerted action may be inadmissible because it

follows that activity. Although Mitchell's alleged statement to Braverman occurred on January 16, 1986, and after the decision to reject Robert's application was made, there is no evidence to support the conclusion that the dealers' statements to Mitchell followed the rejection of Robert's application. In addition, that a vicarious admission is disclosed after the fact does not defeat its admissibility. *See Mahlandt v. Wild Canid Survival & Research Center, Inc.*, 588 F.2d 626 (8th Cir. 1978).

The Potamkins also assert that the dealers' statements to Mitchell are admissible under Fed. R. Evid. 801(d)(2)(E), the co-conspirator admission provision. In *United States v. Ammar*, 714 F.2d 238 (3d Cir. 1983), *cert. denied, Stillman v. United States*, 464 U.S. 936 (1983), we comprehensively identified the requirements for such an admission: 1) independent evidence establishes the existence of a conspiracy and connects the declarant and defendant to it; 2) the statement was made in furtherance of the conspiracy; and 3) the statement was made during the course of the conspiracy. *Id.* at 245. The proponent must establish the first requirement by a "fair preponderance of independent evidence." *Id.* at 250. Mere association does not suffice but, on the other hand, timing, circumstances, one or a series of meetings, may. *Id.*

More recently, while not deciding the question of whether the challenged hearsay statement alone might adequately demonstrate conspiracy, the Supreme Court ruled that the conspiracy need not be exclusively proven by evidence *aliunde*. *Bourjaily v. United States*, 483 U.S. 171, 181 (1987). *See United States v. Levy*, 865 F.2d 551,

553A (3d Cir. 1989). Thus, for the first element, we may look to independent evidence plus the statement itself for evidence of a conspiracy. On appellate review, the witness' statements "must be accepted as true for the purposes of determining the sufficiency of the evidence." *Ammar*, 714 F.2d at 251. As well, the co-conspirator admission of Rule 801(d)(2) does not require personal knowledge. As noted by the Advisory Committee, Rule 801(d)(2) is designated as admission against interest; its admissibility is premised upon our adversarial system rather than in reliance upon indicia of reliability or trustworthiness. *Id.* at 254; *see United States v. Castro*, 776 F.2d 1118 (3d Cir. 1985), *cert. denied*, 475 U.S. 1029 (1986).

Because the Potamkins have proffered evidence to show concerted action in violation of the Sherman Act, they have demonstrated the requisite conspiracy for admissibility under Rule 801(d)(2)(E). This judgment is entirely separate from the fact that both Mitchell and Rosen, in their deposition testimony, categorically deny the statements attributed to them in Braverman's testimony. At trial, the factfinder must decide which of the diametrically opposed witnesses are truthful.

Last, the district court reasoned that Braverman's testimony did not support an inference that dealer sentiment caused BMW NA's inaction on Robert's application. Memorandum Opinion at 10. We agree that as with the Gray affidavit, the Braverman testimony alone does present sufficient evidence from which a reasonable jury could find concerted action in violation of section one of the Sherman Act.

Appendix A

IV.

BMW NA provides a variety of reasons for allegedly independently rejecting the Potamkins as BMW dealers. The district court found these reasons compelling, on balance, when contrasted to the "19 bits" of evidence it attributed to the Potamkins.[11] To the contrary, although a jury may

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11. These "19 bits" were identified as follows:

1. the letter rejecting Victor Potamkin's Great Neck application;

2. the affidavit of Harry Gray;

3. BMW NA's failure to differentiate among the various members of the Potamkin family;

4. and 5. Michael Jackling's and Terry Cronin's assertions that they did not want the Potamkins as dealers because they were "price discounters,";

6. Bruce Braverman's testimony about statements made by Don Mitchell;

7. BMW NA's alleged opposition to price advertising by its dealers;

8. dealers' cooperative efforts to enforce advertising standards;

9. evidence that BMW dealers had a strong motive to exclude [the] Potamkin[s];

10. the testimony of Michael Vadasz;

11. discussions of sales figures at dealer advertising group meetings;

12. groups of BMW dealers are organized into "Twenty Group" clubs;

13. BMW NA monitors the average profit margin for all dealers in each region;

14. allocation of vehicles;

15. the 1978 dealers' manual; consulting existing dealers about new applicants;

16. the testimony of Frank Ursomarso;

17. evidence that BMW NA conferred with other New York metropolitan dealers "concerning plans for the New York market";

18. evidence that BMW NA punished discounters by

credit BMW NA's reasons, we cannot conclude that a reasonable jury would disbelieve the Potamkins' substantial rebuttal evidence. In light of BMW NA's many inconsistent reasons for denying the Potamkins a franchise, and assuming all credibility determinations in favor of the Potamkins at this juncture, we are satisfied that they have met their burden of proof.

Viewing the evidence in a light most favorable to the Potamkins while bearing in mind that an antitrust plaintiff must assert an economically sensible claim, we turn to consider BMW NA's alleged independent reasons and the Potamkins' evidence that these reasons were pretextual. In sum, BMW NA alleges that the Potamkin image as high volume price-discounters was incompatible with the desired BMW image; the Potamkins' customer service record was inadequate; the proposed Philadelphia location was inadequate for a number of reasons; the Potamkins were uncooperative; and Robert objected to an annual allocation of 94 cars.[12] Indeed, when contrasted to

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decreasing their allocations; and last,

19. BMW NA's aversion to the Potamkins.

12. A November, 1985 memorandum from Robert Casella, Business Development Manager for the Mid-Atlantic Region, to Edward Robinson, BMW NA's Eastern Region Sales Manager, best articulates BMW NA's position:

> 1. Mr. Potamkin has not indicated a willingness to provide the necessary minimum operating requirements standards for Service and Parts.
>
> 2. It is not clear that proposed Potamkin BMW would be a distinct and separate operation allowing for the complete autonomy needed for a proficient and distinct BMW operation.

Appendix A

BMW NA's earlier actions expressive of an interest in the Potamkins, the plethora of complaints pressed by BMW NA is both internally inconsistent and inconsistent with its concomitant treatment of BMW dealers. We turn to address BMW NA's

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> 3. Mr. Potamkin has expressed an unwillingness to provide the necessary exclusive personnel required for the BMW operation.
>
> 4. As a dealer in Philadelphia, Pennsylvania, and through his association and vested interest in the Potamkin New York organization, Robert M. Potamkin brings a somewhat cloudy commitment to customer satisfaction and customer service, in addition, to publicly announced pending legal action for odometer tampering, advertising misrepresentation, and questionable leasing tactics. The above as evidenced by enclosed newspaper articles.
>
> 5. Mr. Potamkin has emphatically stressed that the guide of 94 units would not be acceptable. It is felt that at some time in the future our status at the proposed facility would be compromised and the BMW operation would be shuffled into secondary or less than adequate accommodations.

A1901.

In addition, many of those same reasons were provided to Green by Andrew Pokorny:

> . . . Moreover, to date, Mr. Potamkin has been unwilling to agree to meet BMWNA's minimum standard operating requirements, and to accept an SPG of 94 units – the identical SPG you have. We are unwilling to accept any buyer not prepared to meet our minimum operating standards. In addition, Potamkin's action reflects a spirit of non-cooperation which is contrary to that required to build a good working relationship. . . .

A869-70.

alleged reasons for refusing to grant a franchise to the Potamkins.

A.

As its primary reason for refusing to grant a franchise to the Potamkins, BMW NA asserts that the Potamkins threatened harm as potential "free rider" dealers. BMW NA mistakenly reads *Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717 (1988), to support its proposition that no liability could attach to its decision not to appoint the Potamkins as dealers. It contends that under *Sharp*, the Potamkins must prove an agreement to fix prices or price level, and BMW NA maintains that it has not set price levels for its cars, although the record is replete with evidence that BMW NA representatives and dealers share and discuss retail price statistics. A1845; *see also* A2053; A2063-64.

Therefore, there is evidence of a concrete motive for dealer animus toward other dealers who would undercut a flexibly set price over invoice by advertising sales at, for example, $99 over invoice. Nevertheless, there is no direct evidence, only evidence from which a factfinder could infer, that BMW NA and its dealers have tacitly fixed prices for BMWs.

BMW NA further asserts that it does not prohibit its dealers from price advertising. *See, e.g.*, A135-37 (testimony of BMW NA's Mid-Atlantic Region Business Development Manager Robert Casella); A327-31 (testimony of BMW NA's Mid-Atlantic Region District Manager Martin Focht). In fact, numerous BMW dealers concurred that they are free to price advertise. *See, e.g.*, A420

(testimony of BMW dealer Gene Hoffman); A399 (testimony of BMW dealer Irv Green); A406 (testimony of BMW dealer Andrew Hill); A502 (testimony of BMW dealer Martin Lustgarten); A225 (testimony of BMW dealer Mario Cesarini). BMW NA and its dealers do admittedly discourage other BMW dealers from engaging in price advertising because they view that practice as counterproductive given the preferences and demographics of a typical BMW customer. As one dealer explained, "The quality of the product is a factor, but you have to understand as a dealer who your customers are, what the demographics of the customers are and figure out how to handle that customer." A2470. Accordingly, customers spending more than $30,000 for an automobile "don't want it thought of as a price item . . . . [I]t is an image thing, an association, an affinity with a fine product." A330. BMW NA's Senior Vice President of Operations, Michael Jackling, stated that BMW NA speaks with its dealers about advertising and about setting the appropriate tone.

> Because BMW is marketing a luxury product, BMW is very sensitive as to how that product is perceived in the marketplace, so . . . that the product value itself is maximized through its image as well as its specification, performance and ownership qualities.

A450.

Thus BMW NA claims that the Potamkins' advertising style — prominently featuring prices and terms like "blow out sale" or "sellathon" A314-17; A915-28 — is incompatible

with the BMW image and heavily influenced BMW NA's decision to reject the Potamkins.

BMW NA misapprehends the legal parameters. In *Sharp*, the Court held that "a vertical restraint is not illegal *per se* unless it includes some agreement on price or price levels." Ruling after a trial in which the jury was instructed only on a *per se* theory of liability, the Court remanded the case for a new trial holding that *per se* illegality would not attach to a vertical non-price restraint and that "an agreement between a manufacturer and a dealer to terminate a 'price cutter,' without a further agreement on the price or price levels to be charged by the remaining dealer," must be judged under a rule of reason test. 485 U.S. at 726, 736. Thus, even if this case is on all fours with *Sharp*, the Potamkins may still proceed to a jury trial under the rule of reason test.[13]

Moreover, this case has an additional horizontal component that *Sharp* lacked. In *Sharp*, a single dealer, Hartwell, pressured Sharp to terminate Business Electronics. Here the Potamkins pled in their complaint, and the evidence suggests, that a *number* of BMW dealers combined to form a group boycott to pressure BMW NA to reject Potamkin competition. The Potamkins assert that all of BMW NA's alleged reasons for rejecting them are pretextual and that until BMW dealers voiced their strenuous opposition to Potamkin competition,

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13. Proof of anticompetitive effect is the hallmark of a rule of reason test, *see Tunis Bros. Co., Inc. v. Ford Motor Co.*, 952 F.2d 715, (3d Cir. 1991) *cert. denied*, 60 U.S.L.W. 3871 (June 30, 1992), and it is well settled that interbrand, rather than intrabrand, competition should be the goal of antitrust law. *GTE Sylvania*, 433 U.S. at 52.

BMW NA had acknowledged the value of installing Potamkins as dealers. Thus the Potamkins present a horizontal boycott case, rather than the non-price vertical restraint suggested by BMW NA. As we fully evaluate *infra*, the evidence of record, when viewed in the light most favorable to the Potamkins, supports their proposition.

Sharp suggests that the proper distinction between a horizontal and a vertical restraint lies in determining which kind of an arrangement produces the restraint rather than analyzing its anticompetitive effects. *Sharp*, 485 U.S. at 730 n.4. Under either analysis, however, when viewed in the light most favorable to the Potamkins, the evidence suggests that BMW NA rejected the Potamkins as a result of dealer opposition to price competition.

Last, *Sharp* also reflected the concern that fear of antitrust liability should not serve to inhibit a manufacturer's ability to expel "free riders" from its dealership body. BMW NA insists that it feared a "free rider" effect. As explained in *GTE Sylvania*, 433 U.S. at 55, this effect occurs when the "free riding" retailer reduces or eliminates service to create price competition and a customer researches a purchase at a full service retailer but ultimately buys the product from the discounting retailer. BMW NA maintains that it feared just such an effect, emphasizing that quality service is crucial to its reputation and ultimate success. In support of its claim, BMW NA asserts that the Potamkin reputation evokes a high volume, price discounting image. When viewed in the light most favorable to the Potamkins, however, the record

suggests that this image incompatibility, as well, is simply pretextual.[14]

Indeed, there is evidence to suggest that the Potamkins would not have posed the "free rider" problem. Robert Potamkin asserts that he had been willing to conform to any service and facilities

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14. In a letter to BMW dealer Irv Green, Andrew Porkorny, BMW NA's Vice President of Regional Operations and Sales, also provided as a reason for the decision that "Mr. Potamkin is not qualified," the following:

> In general, it is clear to us that there is a fundamental incompatibility between the "BMWNA" corporate image and the "Potamkin" image, that the proposed buyer will not maintain the high commitment to customer service required by BMWNA, and that Mr. Potamkin will not properly represent BMWNA in the market place. As a result, the public and BMWNA will be harmed should your proposed transaction go forward.

A869. In an effort to prove that incompatibility, BMW NA has also produced the report of a private investigator, Earle Gay, which was prepared at the request of BMW NA's counsel during the pendency of Robert's application for the Green franchise. The Potamkins have provided sufficient evidence to render as a material factual dispute the genuineness of this "image" reason, however, especially as it relates to Gay's report.

First, combined with the other evidence to indicate that BMW NA never intended to consider Robert's application, there is no dispute that Robert's application was the first for which BMW NA hired a private investigator's services. A2288. Gay submitted his report directly to the Weil, Gotshal & Manges law firm and BMW NA decision-makers never received a copy of it. A2164. Further, from the information provided to Gay at the outset of his investigation a jury could infer that BMW NA was culling pretextual excuses to deny a Potamkin franchise. Gay testified that he was ordered to investigate consumer complaints, but not provided with favorable references furnished by Robert. A2292-98. Despite BMW NA's

requirements that BMW NA demanded. Robert insists that he was willing to meet any BMW requirement, "if I could get somebody in authority to talk to me." A1974; 1977. Despite BMW NA claims that Robert evidenced an uncooperative attitude, an internal BMW NA document acknowledged that Robert had promised to meet all required BMW standards. *See* A1998-99.[15]

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contention that applicant references are always favorable and therefore were considered less valuable for purposes of its investigation, Gay testified that in each subsequent investigation of a potential dealer, BMW NA furnished him with a copy of the application and he checked positive as well as negative sources.

Moreover, BMW NA's thorough investigation into the Potamkins' business practices appears pretextual given its lack of interest in similarly investigating other prospective and existing dealers. For example, although Gay was asked to investigate all consumer complaints against the Potamkins, a 1981 lawsuit brought by the Pennsylvania Attorney General against several Toyota dealerships, who also owned BMW franchises, attracted no attention from BMW NA. One BMW dealer who entered into an "assurance of voluntary compliance" with the state Attorney General's Office testified that he did not receive an inquiry from BMW NA. A2040-41.

15. Another reason given by BMW NA pertained to alleged deficiencies in Robert's Philadelphia location. We note that these are no more extensive than those attributed to other prospective and existing dealers, and a reasonable jury may find that rationale for BMW NA's decision to have been pretextual. For example, one BMW dealer, John Thompson, whose franchise acquisition was conditioned upon relocation, received numerous extensions over several years. A2034-40. By contrast, BMW NA contends that the location of Robert's proposed facility was undesirable, as had been Green's location, and that BMW NA had planned to move that dealership point north into the more affluent suburban area where Sloane BMW was eventually opened. Yet, in contrast to

Additionally, only innuendo supports BMW NA's assumption that the Potamkins would have engaged in price advertising BMWs. In fact, one BMW NA "Inter-Branch Memo" reported that "[Robert] stated . . . [he] has no intention of utilizing [price advertising] in [the Potamkin organization's] potential activity with the BMW franchise." A1989. Alan Potamkin also testified that each Potamkin franchise belonged to its corresponding Dealer Advertising Group, A2444; one could presume that Robert and Alan would have adhered to that practice and joined the Philadelphia area BMW NA DAG and its collective advertising efforts.

The record is equally clear that a number of BMW dealers did engage in price advertising on occasion. *See, e.g.* the testimony of BMW dealers: Green, A399; Hoffman, A409-10; Lustgarten, A500; Hill, A327-31. Although these dealers were

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the negotiations with and repeated extensions given to Thompson, BMW NA never informed Robert of this alleged deficiency. Robert also opined that his proposed facility, located at a busy crossroads frequented by residents of the northern suburbs, would have been an appropriate one.

Another dealer, Frank Ursomarso, conceded that he failed to meet a requirement of separate franchise facilities but has reached a compromise with BMW NA. A2465. For example, in response to one deficiency of which Robert was informed, lack of a customer service counter, he promised to build one to suit BMW NA. In contrast, BMW NA's District Parts Manager John Graynor indicated to Robert and his parts manager that BMW required an exclusive BMW parts manager and counted their disagreement as a deficiency; yet Robert was never informed that many BMW dealerships satisfied that requirement by assigning one assistant parts manager exclusively to the BMW franchise. A1916-18.

"counseled" by District Manager Martin Focht and other BMW NA representatives, A327-31; A2210-12, sometimes at the behest of competing area dealers, price advertising remained an occasional practice. A327-31. Significantly, BMW NA ultimately granted a franchise to one dealer who displayed the same price advertising practices associated with the Potamkins.[16]

We do not mean to suggest that BMW NA had a responsibility even to consider the applications of the Potamkins. Clearly, as long as it acted independently, BMW NA could escape antitrust liability for its conduct. But the Potamkins have provided sufficient evidence of concerted action, and have raised genuine issues of material fact, which call into question BMW NA's statement of reasons for rejecting the Potamkins. There is no evidence that the Potamkins' service and facilities would not have equalled those of other qualified dealers and applicants, *see supra*, notes 14-15; however, and there is sufficient indication that the alleged concerted action between BMW NA and its dealers may have diminished retail competition without a corresponding benefit to consumers. Moreover, like the manufacturer's reversal of opinion in *Arnold Pontiac*, BMW NA's conduct is inconsistent with all of the evidence that BMW NA's Eastern Regional Manager Cronin negotiated

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16. Although BMW NA rejected BMW dealer Robert Ciasulli's initial application for a franchise in a 1981 proposed buy-sell agreement, citing a "perceived lack of commitment to customer satisfaction," A2214, and again in 1986, citing concerns nearly identical to those invoked when rejecting Robert's application, A2229-30, the record indicates that Ciasulli subsequently received the Mack BMW franchise in Toms River, New Jersey. A2377; 2307-08.

with Victor Potamkin in good faith, and even after Victor allegedly tried to bribe Cronin, Cronin allegedly encouraged Robert to buy Green's Philadelphia franchise. If proven at trial, the fact that the Philadelphia area dealers, like the New York area dealers, were familiar with the Potamkins' success as high volume price discounters and feared that kind of competition, would make sense of BMW NA's reversal of opinion with respect to the Potamkins.

B.

Another of BMW NA's reasons for rejecting Robert Potamkin's application for the Philadelphia franchise was his alleged challenge to the number of cars he would be allotted annually. When BMW NA field personnel took his application in late October of 1985, Robert qualified his signature on the "New Dealer Information and Requirements" form, with the typed notation: "I do not accept Irvin Green's SPG (planning guide). It is unreasonable." A1207. This notation became one of the primary reasons cited for BMW NA's rejection of Robert's application.

While the precise definition of the SPG remains in dispute, the parties agree that a dealer's SPG serves as a guide to the number of BMW automobiles allotted to it annually. A dealer's SPG is derived from both the number of cars available from the German manufacturer and BMW NA's assessment of the sales requirements and service capacities of each dealership. BMW NA has been imprecise in defining the SPG throughout this litigation

In October of 1985, before Robert Potamkin made the notation, Robert Casella, BMW NA's

Appendix A

Regional Business Development Manager, informed Robert that Green's dealership carried with it an SPG of 94. A171-72; A1999. Despite Casella's view that the SPG serves merely as a guide or a forecast, (in his words, "I'm not aware that it has [limited allocations] but it could," A1803-04), he did not convey that to Robert. A171-72; A1999. The BMW NA representatives who subsequently evaluated Robert's proposed facility were unqualified to negotiate the SPG and also declined to explain it. A632. Robert explained that he refused to sign without reservation, and thereby to obligate himself to, a form that indicated an annual cap of 94 BMWs, before he could speak to someone in authority at BMW NA. He testified that he signed the form with the notation so as to comply as fully as possible with BMW NA requirements, but he did not want to be bound by a figure that he felt had been neither adequately explained nor justified. A910-12. His notation was received as evidencing an uncooperative attitude, yet it is undisputed that no one from BMW NA inquired of Robert concerning his notation. A869-70.

BMW NA has explained, however, that the SPG of 94 conformed with corporate policy. According to Phil Caposella, Mid-Atlantic Regional Manager in 1985, when a dealer acquires a dealership through a buy-sell agreement, he inherits the same SPG as the seller. A111; *see* A171-74; A495. The SPG is thus neutral and serves neither to inflate or deflate the price of the dealership during the transaction. A new dealer may, however, anticipate an increased SPG after, for example, demonstrating an ability to accommodate a higher

"rate of travel" (actual sales), A98-99; A490-91, or expanding or enhancing its facility. A337-38.

Nonetheless, there is substantial evidence which shows that the SPG did not limit actual allocations of cars. Green's eventual successor, Sloane BMW, while nominally bound by an SPG of 94, A1898, actually obtained approximately 400 BMWs a year. A1830. An internal BMW NA memorandum suggests that the decision to hold Sloane BMW to a nominal SPG of 94 was motivated by this litigation. A1898. In fact, District Manager Focht praised Sloane for selling more than 101 BMWs during its first three months of operation. A2305. BMW dealer Sloane's experience is consistent with that of another BMW dealership manager, Michael Vadasz, that his SPG never limited the number of cars he would be able to sell, A793; *see, e.g.*, A1887-88 (Focht), and of dealer Andrew Hill of Devon Hill Motors. A2118-20. In fact, Hill believed that the SPG equals approximately one-half of a dealer's actual allotment. A2124. And BMW NA's President, Gunter Kramer indicated, the "actual allocation is also determined by rate of travel," unless that rate indicates price discounting. A491. None of this was explained to Robert; he was simply told that his SPG would be 94 and no more.

Moreover, Robert indicated that he had been willing to meet any BMW NA criteria, including renovations to his proposed facility, to meet standards required for a higher SPG, and had so informed Casella. A1708-09; A1719; A1999. As evidence, Robert produced the cover letter submitted with his application to Casella, BMW NA's Mid-Atlantic Region Business Development Manager. In relevant part, Robert wrote:

Appendix A

> On Tuesday I gave you a copy of plans for a facility in which we could put our BMW dealership. As we discussed, facility size and car numbers go hand in hand. That facility could be used exclusively for BMW in both sales and service if we get enough cars to support it. If we get a smaller number of cars, we could use the showroom for both BMW and VW and the service department for BMW exclusively. We will consider both smaller facilities and larger facilities as the number of cars dictates.

A1719. In contrast to BMW NA's theory of noncooperation, Casella's own internal BMW NA memorandum reflects Robert's willingness to meet any requirements. A1998-99.

C.

Integral to BMW NA's theory of the case is its assertion that during the early 1980s, BMW NA was initiating a dealer "upgrade" program. This involved targeting items for improvement, gradually improving deficient aspects of existing dealerships, and requiring improved standards of prospective franchise applicants. BMW NA also faults Robert for planning to place his BMW dealership in an "automall" adjacent to Robert's other dealerships.

The Potamkins proffer significant evidence suggesting that this reason, as well, is pretextual. First, and most importantly, the Potamkins produced a letter addressed to Business Development Manager Casella, that Robert had expressed an interest in making his BMW facility exclusive if he received the number of cars necessary to make it profitable. A1719. Despite

this invitation, Robert stated that he was not asked to make the dealership exclusive. *See* A1710-11. Second, many other BMW dealers operated multi-franchise dealerships and, contrary to BMW NA's implication, BMW NA appeared unconcerned, and in some cases even unaware, of the additional franchises.

Finally, Casella opined that with an SPG of 94, Robert would be likely to "shuffle" his BMW franchise to less accommodating facilities, A194-95, tacitly acknowledging that with an SPG of 94 a BMW dealership would have been only marginally profitable. In addition to BMW NA's intent to hold Robert to the SPG, as contrasted with the treatment accorded other dealers, this decision makes little economic sense for BMW NA. Accordingly, BMW NA's President, Gunter Kramer, acknowledged BMW NA's emphasis on dealership profitability. *Cf.* A480-81;

Finally, BMW NA's alleged concern that Robert's dealership was not to be an exclusive one is weakened by the testimony of BMW NA representatives that in 1985, the definition of an "exclusive" dealership had not yet been clarified. Prior to the arrival of Vice President and Director of Operations, Jackling, an "exclusive" dealership could consist of a different building from, even if physically attached to, other franchises. Over time, this concept evolved to require that the BMW franchise would stand alone entirely. In 1985, however, Robert's proposed BMW showroom and service area would have met the first definition of exclusive.

D.

In summary, although BMW NA offers a wide variety of reasons for having rejected the Potamkins as BMW franchisees, it has failed to meet the standard of proof necessary for summary judgment. The Potamkins have countered each alleged reason with evidence that both discredits BMW NA's witnesses and provides independent support for the Potamkins' claim that BMW NA and its dealers acted in concert to repel any Potamkin competition in BMW sales.

Because the Potamkins have adduced sufficient evidence to support their federal antitrust claim, we will vacate the order granting summary judgment on Count I and remand the case for further pretrial proceedings. As well, the judgment with respect to Counts IV and V, dismissed pursuant to the disposition of Count I, will be vacated and remanded.

V.

In Count III, the Potamkins also claim that BMW NA tortiously interfered with their contract and prospective contractual advantage to purchase the Green and Trans-Atlantic dealerships, respectively. The district court granted BMW NA summary judgment on this claim as well, concluding that the Potamkins lacked an enforceable contract in either case absent BMW NA's approval and that BMW NA was privileged not to offer its approval.

A.

The parties apparently agree that sections 766 and 766B of the Restatement (Second) of Torts,

adopted by both New York and Pennsylvania, govern.[17] *Guard-Life Corp. v. S. Parker Hardware Mfg. Corp.*, 50 N.Y.2d 183, 406 N.E.2d 445, 448 (1980); *Alder, Barish, Daniels, Levin and Creskoff v. Epstein*, 482 Pa. 416, 393 A.2d 1175, 1183-1184 (1978); *see Thompson Coal Co. v. Pike Coal Co.*, 488 Pa. 198, 412 A.2d 466, 471 (1979).

With respect to the Green agreement, we look to section 766, entitled, Intentional Interference with Performance of Contract by Third Person, which provides:

> One who intentionally and improperly interferes with the performance of a contract . . . between another and a third person by inducing or otherwise causing the third person not to perform the contract, is subject to liability to the other for the pecuniary laws resulting to the other from the failure of the third person to perform the contract.

Restatement (Second) of Torts, § 766 (1979). Factors delineating the contours of "improper"

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17. The parties have not addressed the question of choice of law. It remains true that if New York law governs the Trans-Atlantic incident (prospective contractual advantage) and Pennsylvania law the Green agreement (contractual relationship), then the Restatement (Second) of Torts, as adopted by each jurisdiction, would apply. We will proceed on that assumption.

We note, however, that if Pennsylvania law were to control the prospective contractual advantage claim, proper recourse should be made to section 766 of the Restatement (First) of Torts. *Silver v. Mendel*, 894 F.2d 598, 601-02 (3d Cir.), *cert. denied*, ___ U.S. ___ 110 S. Ct. 2620 (1990).

conduct are set forth in section 767,[18] and include the nature of the actor's conduct and intent.

As articulated by the Pennsylvania Supreme Court, proper conduct may be described as "socially acceptable conduct" that comports with the "'rules of the game' which society has adopted." *Alder, Barish*, 482 Pa. at 433, 393 A.2d at 1184.

Because only an agreement in principle had been reached during the Trans-Atlantic negotiations, sections 766B, Intentional Interference with Prospective Contractual Relation, governs that claim:

> One who intentionally and improperly interferes with another's prospective contractual relation (except a contract to marry) is subject to liability to the other for the pecuniary harm resulting

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18. They include:

> In determining whether an actor's conduct in intentionally interfering with a contract or a prospective contractual relation of another is improper or not, consideration is given to the following factors:
>
> (a) the nature of the actor's conduct,
> (b) the actor's motive,
> (c) the interest of the other with which the actor's conduct interferes,
> (d) the interest sought to be advanced by the actor,
> (e) the social interests in protecting the freedom of action of the actor and the contractual interests of the other,
> (f) the proximity or remoteness of the actor's conduct to the interference and the relations between the parties.

Restatement (Second) of Torts, § 767 (1979).

> from loss of the benefits of the relation, whether the interference consists of
>
> (a) inducing or otherwise causing a third person not to enter into or continue the prospective relation or
>
> (b) preventing the other from acquiring or continuing the prospective relation.

Restatement (Second) of Torts § 766B (1979). Having set forth the applicable legal principles, we turn to the parties' contentions.

B.

With respect to the Green agreement, BMW NA urges that absent a valid, enforceable contract, the Potamkins would not have a claim for tortious interference. Likewise, BMW NA claims that a higher standard is required for a prospective contractual advantage, and that, concerning Trans-Atlantic, it has also not been met. To the contrary, the Potamkins contend that if we reverse the antitrust claim in their favor, they have, *a fortiori*, presented material factual issues on the question of whether BMW NA's interference amounted to actionable "improper" conduct.

Although variously couched as a "privilege to interfere, or interference not improper," the Restatement provides that "[t]he issue in each case is whether the interference is improper or not under the circumstances . . . ." § 767, comment b. Further, "[a] determination of propriety requires inquiry into the 'mental and moral character of the defendant's conduct.'" *Brownsville Golden Age Nursing Home, Inc. v. Wells*, 899 F.2d 155, 159 (3d Cir. 1988).

Some stated examples of improper conduct are particularly germane. In one, "conduct that is in violation of antitrust provisions or is in restraint of trade" may constitute improper interference. Restatement (Second) of Torts, § 767 comment on clause (a). Economic pressure, such as that allegedly applied to Caufield when BMW NA bought Trans-Atlantic at a significantly lower price than the Potamkins had offered while suggesting that she had nothing to sell without its approval, may constitute unprivileged, improper interference. BMW NA's allegedly disingenuous delay in taking Robert's application for the Green franchise, if found by the jury to have violated the Pennsylvania Board of Vehicle Act and to have been sufficiently intentional, could also constitute improper interference. Because the factual underpinnings of these tort claims are intertwined with antitrust claims, we will vacate the district court's judgment with respect to them and remand them as well.

VI.

In its cross-appeal, BMW NA challenges the district court's denial of summary judgment on Count II, alleging a violation of the Pennsylvania Board of Vehicles Act, 63 Pa. Stat. Ann. § 818.1, *et seq.* Although BMW NA presented a multifaceted attack on this claim in its motion before the district court, on appeal it has appropriately confined its challenge to the single question certified by the district court: "Does a prospective purchaser of an automobile dealership have standing to pursue a claim under the Pennsylvania Board of Vehicles Act . . . against a franchisor who withholds its consent to the transfer of a

franchise?" (citations omitted). The Act provides for liability where a franchisor has acted so as to:

> (3) Unreasonably withhold consent to the sale, transfer or exchange of the franchise to a qualified buyer capable of being licensed as a new vehicle dealer in this Commonwealth [, or]
>
> (4) Fail to respond in writing to a request for consent as specified in paragraph (3) within 60 days of receipt of a written request . . . . Such failure shall be deemed to be refusal to consent to the request.

63 Pa. Stat. Ann. § 818.9(b)(3) and (4). Section 20 provides for civil actions:

> Notwithstanding the terms . . . of any agreement . . ., [i] any person who is or may be injured by a violation of a provision of this act or [ii] any party to a franchise who is so injured in his business or property by a violation of a provision of this act relating to that franchise or [iii] any person so injured because he refused to accede to a proposal for an arrangement which, if consummated, would be in violation of this act, may bring an action for damages and equitable relief, including injunctive relief, in any court of competent jurisdiction.

63 Pa. Stat. Ann. § 818.20(a) (bracketed numbers added for purpose of explanation).

Since this count raises an issue of Pennsylvania law, our duty is to predict how the Pennsylvania Supreme Court would decide this issue. *Robertson v. Allied Signal, Inc.*, 914 F.2d 360, 378 (3d Cir. 1990); *see Commissioner v. Estate of Bosch*, 387 U.S. 456, 465-65 (1967). We must make this

prediction without the benefit of substantive legislative history or Pennsylvania caselaw concerning this standing provision of the Board of Vehicles Act. Lacking direct guidance on the interpretation of this Act, we turn to the general instructions of Pennsylvania's Statutory Construction Act of 1972, 1 Pa. C.S.A. § 1501 *et seq.* (Purdon's Supp. 1991). The Statutory Construction Act provides that we should construe the Act "to give effect to all its provisions," and further provides that "when the words of a statute are clear and free from all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit." 1 Pa. C.S.A. § 1921(a), (b) (Purdon's Supp. 1991).

Given this guidance from the Pennsylvania legislature, we conclude that the clause providing that "any person who is or may be injured by a violation of a provision of this Act . . . may bring an action . . ." plainly confers standing upon the Potamkins.

BMW NA contends that the Act protects only franchisees' economic interests by leveling the playing field between franchisees and manufacturers, and therefore does not impose on manufacturers any duty to *prospective* franchisees. While this contention has some appeal, we reject it because it is inconsistent with the plain language of section 818.20. Second, BMW NA contends that the standing conveyed to "any person who is or may be injured . . ." by section 818.20(a), must be read narrowly so as to avert rendering unnecessary the standing conveyed in the following clauses. In other words, if "any person who is or may be injured" were broadly construed to encompass the Potamkins, the

following clauses would not enlarge the class of litigants. BMW appears to suggest that "any person who is or may be injured" refers to violations of the statute *other than* those relating to regulation of franchises.

The Act does not support BMW NA's position, however, and BMW NA has not cited any binding or even persuasive cases. In none of the cases BMW NA cites did the courts construe a statute similarly broad in granting standing to "any person." At least with respect to the standing provision in clauses one and three BMW NA's concern that the first makes the remaining clauses superfluous is misplaced. The concern of the first clause is injury caused by violation. The concern of the third, providing standing to "any person so injured because he refused to accede to a proposal for an arrangement which, if consummated, would be a violation of this act," is injury caused by refusal to participate in a violation; no actual violation need occur. Even if the first clause covered every conceivable violation, some additional persons could sue under the third clause.

BMW NA also asserts a policy argument, predicting that if the court opens the door to prospective franchisees, manufacturers will be afraid to deny applications, even reasonably, for fear of litigation. Where manufacturers have acted reasonably, however, they have not only the defense of reasonableness, but in litigation brought in the federal courts, the protection of Rule 11 as well. Moreover, the fear of litigation is not alien to car manufacturers nor limited exclusively to them; they are subject to all kinds of liabilities — product, negligence, and, even under this statute,

liability to franchisees. These are subsumed in the cost of doing business and from society's viewpoint have favorable aspects which outweigh the negative ones.

In sum, we will not diverge from the plain language of the Pennsylvania Board of Vehicles Act's standing provision, especially where we cannot find support in legislative history or caselaw for doing so.

VII.

We will therefore vacate the grant of summary judgment on Count I, vacate the dismissal of Counts III, IV and V, and affirm the district court's order with respect to Count II, remanding all counts for further proceedings.

ROTH, *Circuit Judge*, concurring and dissenting:

I join part VI of the majority's opinion and judgment which affirms the denial of summary judgment on the Potamkins' claim under the Pennsylvania Board of Vehicles Act. However, I respectfully dissent from the majority's disposition of the Potamkins' antitrust and tortious interference with contract claims. In regard to the antitrust claim, I conclude that the plaintiffs have not met their burden of producing evidence which tends to show that the distributor, BMW NA, had entered into a conspiracy with its dealers to boycott the Potamkins. More significantly, I find that plaintiffs have not met their burden of producing evidence that tends to exclude the possibility that BMW NA was acting independently of its dealers when it rejected the Potamkin dealerships. *Monsanto Co. v. Spray Rite Service*

Corp., 465 U.S. 752, 768 (1984). There is no evidence of a "conscious commitment to a common scheme designed to achieve an unlawful objective." *Id.*; *Edward J. Sweeney & Sons, Inc. v. Texaco*, 637 F.2d 105, 111 (3d Cir. 1980), *cert. denied*, 451 U.S. 911 (1981). I would, therefore, affirm the summary judgment entered against the Potamkins on their Sherman Act § 1 claim. Because the basis for the tortious interference with contract claim is so closely interwoven with the antitrust claim, I further conclude that it must fail with the failure of the antitrust claim. I would, therefore, affirm the grant of summary judgment on that claim as well.

Turning first to the antitrust claim, I believe the majority has misread our standard for summary judgment when it allows the Potamkins' antitrust claim to go forward. As the majority acknowledges, an antitrust plaintiff must be prepared to demonstrate a causal relationship between alleged dealer complaints *and* a distributor's action in order to distinguish concerted action in violation of the Sherman Act from "perfectly legitimate" independent conduct. *Monsanto*, 465 U.S. at 763-64. However, the present case differs from situations such as that in *Arnold Pontiac-GMC, Inc. v. General Motors Corp.*, 786 F.2d 564 (3d Cir. 1987), where we were able to find such a linkage. In *Arnold Pontiac*, there was direct evidence of concerted action which was coupled with circumstantial evidence that GMC had planned to grant Arnold Pontiac-GMC a Buick franchise but changed its mind after a meeting between its representative and the local dealers. We found that the combination of direct and circumstantial evidence raised a genuine issue as to whether the

Buick dealers had conspired to thwart competition at the dealership level. For this reason, we reversed the grant of summary judgment and remanded the case for trial.

Our careful review of the record here shows no direct evidence of a conspiracy that allegedly caused the Potamkins their injury. We are left to infer from only circumstantial evidence whether there was concerted action. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588 (1986). As I relate below, I find that BMW NA's conduct is as consistent with permissible unilateral conduct as it is with illegal conspiracy, and therefore, following *Matsushita*, I find that the evidence is not adequate to support the alleged antitrust conspiracy.

The evidence here suggests at most that at different times New York area and Philadelphia area dealers may have complained to BMW NA about awarding dealerships to the Potamkins. Yet, in *Monsanto*, 465 U.S. at 763, the Supreme Court rejected the notion that a jury could infer the existence of a price-fixing agreement from the complaints of other distributors or "from the fact that termination came about 'in response to' complaints" from other distributors. The Court required something more of section 1 plaintiffs: Evidence that "tends to exclude the possibility that the manufacturer and non-terminated distributors were acting independently." *Monsanto*, 465 U.S. at 764; *Fragale & Sons Beverage Co. v. Dill*, 760 F.2d 469, 473 (3d Cir. 1985).

The Court explained that a plaintiff does not establish an illegal price-fixing agreement solely by proof of complaints by competitors of the

prospective dealer. Complaints about discounters[1] "are natural—and from the manufacturer's perspective, unavoidable—reactions by distributors to the activities of their rivals." *Monsanto*, 465 U.S. at 763. A distributor's decision not to deal may reflect a restraint which is primarily horizontal in nature, in that dealers are trying to suppress competition by utilizing the power of a common supplier. Nevertheless, so long as the distributor made an independent business decision not to do business with a dealer, the fact that the distributor was aware of the dealers' complaints is of no moment. *Id.* at 763-764.

In looking at all of the evidence which the Potamkins present, I understand we cannot compartmentalize the various factual components. However, neither can we read between the lines to infer linkage where there is none. When drawing inferences, we may draw only reasonable inferences from sufficient evidence. For the reasons which follow, I conclude that the Potamkins have not presented the quantum of evidence necessary to permit their case to go to the jury. In reaching this conclusion, I heed the *Monsanto* Court's warning that allowing finders of fact to infer conspiracies from extremely equivocal evidence may deter pro-competitive conduct:

> If an inference of such an agreement may be drawn from highly ambiguous evidence, there is a considerable danger that the doctrines enunciated in *Sylvania* and *Colgate* will be seriously eroded.

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1. The Potamkins had been long recognized for selling high volumes of automobiles at discount prices.

Id. at 763.

Evaluating the evidence in the present case in the light most favorable to the Potamkins, I conclude that a jury could not find a violation of section 1 of the Sherman Act without relying on speculation or conjecture, a result we have cautioned against. *Edward J. Sweeney*, 637 F.2d at 116.

When examined closely, the Potamkins' evidence is slender. With regard to the alleged 1981 conspiracy, the Potamkins present the Gray affidavit along with the statement of Robert Potamkin to support an inference of concerted action. As the majority notes, the Gray affidavit contains no evidence that BMW NA considered the dealers' alleged demands or acted in response to those demands. Nevertheless, the majority reads the affidavit to support an inference that BMW NA knuckled under to dealer pressure. Taking the affidavit together with the other evidence the Potamkins present, I cannot draw such an inference. Gray's testimony relates only Gray's own belief that BMW NA's decision to deny the Potamkins the Great Neck open point came as a result of the New York-area BMW dealers' objections. The affidavit neither mentions whether a BMW NA employee participated in the meeting at which dealers discussed complaining to BMW NA nor supports an inference that the dealers had formed an agreement to pressure BMW NA or its Eastern Regional Manager, Terry Cronin.[2] The

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2. The affidavit suggests that some dealers had complained to Cronin prior to the meeting and that others complained following the meeting. There is nothing to suggest a meeting of the minds followed by concerted action.

affidavit relates only that dealers at the meeting opposed BMW NA's granting the Potamkins a franchise, a sentiment which is not surprising from dealers who would face new competition if the franchise were granted.

Even if a representative of BMW NA were present at the dealer advertising group meeting, such contact between a distributor and its dealers, while evidence of an opportunity to conspire, does not amount to a conspiracy. Our case law suggests such meetings have important business purposes; they provide the distributor or manufacturer with important information which can be used to change product mix or advertising direction. Distributors and dealers must speak "to assure that their product will reach the consumer persuasively and efficiently." *Monsanto*, *supra*, at 763-64.

As further evidence of concerted action by New York area dealers, Robert Potamkin offers his own statement that in late 1985, Gene Hoffman, a BMW dealer in Bloomfield, New Jersey, told him that BMW NA's decision to deny the Potamkins the Great Neck franchise "was due to the fact that other Long Island BMW dealers feared the price competition that a Potamkin BMW franchise would bring to the Long Island market." I do not find that this evidence enhances the Potamkins' conspiracy claim. Again, all businesses fear competition, particularly from a new competitor who will compete on price. Moreover, I do not read Robert Potamkin's affidavit to suggest that Hoffman told him that BMW NA consented to an agreement with its Long Island dealers to exclude

the Potamkins.[3] Robert Potamkin's affidavit, even when considered with the Gray affidavit, does not present evidence which tends to exclude the possibility that BMW NA acted unilaterally to keep the Potamkins out of Long Island.[4] However, even if BMW NA did contact existing dealers, a conclusion refuted by the testimony of Cronin and Hoffman among others, such evidence, when taken together with the Gray and Robert Potamkin affidavits, still does not raise an inference of concerted action between BMW NA and its New York area dealers to deny the Potamkins a franchise. At a minimum, "the circumstances [must be] such as to warrant a jury in finding that the conspirators had a unity of purpose or a common design or understanding, or a meeting of the minds in an unlawful arrangement." *American Tobacco Co. v. United States*, 328 U.S. 781, 810 (1946). BMW NA's own decision to contact its dealers would not meet the Potamkins' burden of having to show that BMW and the dealers had acted with a common design.

Finally, it must be remembered that the 1981 allegations are not part of the antitrust injury complained of here; the Potamkins use those allegations to suggest a pattern of dealing that supports their claim of concerted action arising out of the events of 1985.

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3. Because I am looking at this evidence in the light most favorable to the Potamkins, I will not consider the credibility of this affidavit or of Hoffman's responding affidavit, which denies Robert Potamkin's allegations.

4.

With regard to those 1985 events surrounding the Potamkins' inability to obtain a BMW franchise in Manhattan, the evidence which the Potamkins present is very thin. To suggest concerted action, the Potamkins offer only Robert Potamkin's statement that Gene Hoffman had informed him on May 30, 1986, that a BMW NA representative had visited Hoffman in the fall of 1985 and had asked Hoffman's opinion about the proposed sale of Trans-Atlantic to the Potamkins. Based on this evidence, the Potamkins argue that dealer opposition from 1981 was reactivated in 1985 to defeat their agreement in principle with Caufield for the Trans-Atlantic dealership in Manhattan. Even if Hoffman had complained to a BMW NA representative — Hoffman denies that any representative of BMW ever visited him regarding the possible sale of a dealership in Manhattan to the Potamkins — and even if a BMW NA representative heard similar complaints from other dealers — there is no evidence supporting this point in the record — complaints by competitors, standing alone, are not sufficient to show a conspiracy.[5]

As for other evidence of a 1985 New York conspiracy, the majority notes that BMW NA backed away from its strategy of creating a factory store and instead gave Martin BMW the exclusive Manhattan dealership. However, the factory store concept was not invented to cover up the

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5. I do not suggest that evidence of complaints has no probative value at all, but only that the burden remains on the antitrust plaintiff to introduce additional evidence sufficient to support a finding of unlawful contract, combination, or conspiracy. *Monsanto*, 465 U.S. at 764 n.8.

conspiracy. The uncontroverted documentary and deposition testimony suggests that BMW came up with the idea at least one year prior to the proposed sale of Trans-Atlantic. In short, I find the evidence insufficient to deduce a conspiracy between BMW NA and its New York dealers to deprive the Potamkins of a BMW dealership in Manhattan.

Finally, the evidence that BMW NA conspired with its Philadelphia dealers to prevent the Potamkins from purchasing the Green dealership is equally scant. It stems from one source: the statement of Bruce Braverman, a Potamkin employee, recounting what Donald Mitchell allegedly had told him. I do not agree with the majority's conclusion that the Braverman statement is admissible evidence. Nor can I conclude that the district court abused its discretion in excluding the Braverman statement. *See, e.g., United States v. Gambino*, 926 F.2d 1355, 1364 (3d Cir. 1991). However, even if his statement were admissible, I find that it offers little evidence of the alleged conspiracy.

The majority goes to great lengths to find Braverman's testimony admissible. Yet, I cannot agree with its reasoning for several reasons. First, I find that Braverman's statement of what Mitchell told him should not be admitted as an exception to the hearsay rule because Mitchell does not qualify as an agent of BMW NA acting within the scope of his agency and employment. Second, I find that Braverman's statement also falls short of the exception for the admission of hearsay statements by co-conspirators. Furthermore, even if the Braverman relation of the Mitchell statement is admissible evidence of a conspiracy, it relates

only to a conspiracy between BMW dealers, which is not the conspiracy charged in the complaint. The statement does not refer to BMW NA's role in any such scheme.

The record suggests that Mitchell worked for BMW Credit Corporation

. In his work for BMW Credit, Mitchell had no contact with BMW NA and nothing to do with its decisions on dealer appointments. Therefore, I do not believe that Mitchell's statement to Braverman concerned a matter within the scope of his agency, such that Braverman's retelling should be admissible under Rule 801(d)(2)(D).

In any event I do not find that BMW NA so dominates the activities of BMW Credit that Mitchell could act as BMW NA's agent. The majority finds this a close question. I think the answer is clear.

Moreover, even if Mitchell could have spoken as BMW NA's agent, the admissibility of Braverman's statement is cast into doubt by the multiple layers of hearsay contained within Mitchell's statement as Braverman relates it. As the majority indicates, our case law allows secondary and tertiary levels of hearsay to come in if there is a basis for admitting the hearsay statement. *See* Fed.R.Evid. 805. Braverman testified in his deposition that he remembers Mitchell telling him that Don Rosen was the source of Mitchell's news that other Philadelphia area BMW dealers were going to do what they could to make certain the Potamkins did not get a franchise. However, I do not find that the out of court statements purportedly made by other dealers to Rosen, who then repeated them to Mitchell, should be admissible in light of our

concern for restricting declarations of unidentified persons. Even where we might infer who such persons may be, such supposition does not satisfy the heavy burden on the proponent of the evidence to demonstrate its trustworthiness. *See Carden v. Westinghouse Elec. Corp.*, 850 F.2d 996, 1003 (3d Cir. 1988). We do not know the identity of the other dealers who presumably spoke to Don Rosen, nor do we know whether it was Don Rosen himself or someone else at his dealership who spoke to Mitchell. I note that Mitchell indicated that he did not usually talk to dealership owners when he visited his accounts. Moreover, the nonhearsay evidence contradicts Braverman's testimony. Mitchell denies having made the statements attributed to him by Braverman, and Don Rosen denies having told Mitchell that Philadelphia area BMW dealers had complained to BMW NA about the possibility that the Potamkins would become a dealer.

I also conclude that the Mitchell "statement" is not admissible under the co-conspirator exception, Rule 801(d)(2)(E). I do not find, either within the statement or independent of the statement, any evidence of a conspiracy involving BMW NA *and* the Philadelphia area BMW dealers. Nor do I find that Mitchell held a position relative to BMW NA that could implicate BMW NA in such a conspiracy through Mitchell's actions.

For each of the above reasons, I believe the district court did not err in excluding Braverman's statement. However, even if the trial court did abuse its discretion by ruling that the Braverman testimony was inadmissible, our consideration of the statement in connection with the motion still would not preclude summary judgment for the

defendants on the antitrust claim. In the statement, Braverman asserts that Mitchell told him that the Philadelphia area dealers did not want the Potamkins to have a franchise because they feared price competition. Yet, at his deposition, Braverman responded in the negative to questions regarding whether he knew if Mitchell had spoken to anyone at BMW NA and whether Mitchell knew if the Philadelphia dealers had spoken to anyone at BMW NA about the proposed sale. These negative answers suggest that Mitchell was relating nothing more than the grumbling he heard in his conversations at BMW dealerships. Braverman's testimony provides no hint that BMW NA acted other than unilaterally when it chose not to approve the sale of the Green dealership to the Potamkins. Nothing in what Braverman says Mitchell told him suggests that the dealers communicated demands to BMW NA or that BMW NA acquiesced in those demands or entered an agreement with the Philadelphia area dealers to keep out the Potamkins.[6]

I recognize, of course, that it is rare to find overt evidence of a conspiracy. I note as well that BMW NA may have been both slow and disingenuous in its handling of the Potamkins' application for the Philadelphia franchise. However, BMW NA's failure to consider the Potamkin's application in a prompt and scrupulous fashion does not constitute evidence of a conspiracy.

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6. In addition, I note that, while the majority opinion focuses on the dealer interactions with BMW NA, it overlooks the paucity of evidence showing that the dealers had conspired together to form an anticompetitive scheme.

Appendix A

Beyond the evidentiary problems relating to concerted action, I believe the majority understates the four-year gap between the events surrounding BMW NA's failure to award the Potamkins the Great Neck open point in 1981 and the failed attempts by the Potamkins to purchase dealerships in Manhattan and Philadelphia in the fall of 1985. I find the causal nexus between the 1981 actions and the events of 1985 too attenuated to support the existence of the alleged conspiracy. There is no evidentiary link showing that the alleged 1981 agreement between New York area dealers and BMW was reactivated to keep the Potamkins out of Manhattan in 1985. Even more apparent is the lack of any evidence which supports even an inference that the purported conspiracy from 1981 to deny the Potamkins the Great Neck open point could have been reactivated in 1985 to deny them the Green dealership in Philadelphia. Previously, we have required of plaintiffs "proof of a causal relationship between competitor complaints" and the decision not to deal. *Edward J. Sweeney & Sons*, 637 F.2d at 111. Plaintiffs have failed to meet this same burden of proof here.

Moreover, the relevant literature suggests that the defendant had credible business reasons for rejecting the Potamkins' dealership applications. BMW NA had an interest in protecting its reputation and the image it has attempted to develop as a high quality car distributor. In order to compete with other brands in the market for luxury automobiles, BMW NA had ample reason to want to insure that its products were offered with certain point-of-sale services. BMW NA could have feared that the introduction of a dealer who "sells

at the factory gate" would lead its other dealers to lower the level of service they offered in order to compete better with the price-cutter and prevent the price-cutter from free riding on the services they provided.[7] Finally, BMW NA may have acted in a desire to protect the investments its dealers had made in their own franchises. Had BMW NA's rejection of the Potamkins' applications lacked a sensible economic justification, plaintiffs' allegations of concerted action would be more compelling. While the Potamkins assert that any business justification and, indeed, BMW NA's claim of unilateral action is mere pretext, plaintiffs' allegations must be better supported in the record to survive a motion for summary judgment.

I recognize that the Potamkins have not rested on their conclusory assertions of conspiracy in the face of BMW NA's proffer of substantial evidence supporting plausible and legitimate explanations for its conduct. Instead, the Potamkins have gone further, as the majority relates, to challenge these explanations one by one. I find these challenges unavailing for two reasons. First, I am convinced we need not examine the plausible reasons put forward by the defendant when the circumstantial evidence relied on by the plaintiff does not support a conspiracy claim. Second, the mere fact that the Potamkins can question the business reasons advanced by BMW NA for not awarding the Potamkins any of the franchises does not, by itself,

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7. A review of the depositions and exhibits makes clear that both BMW and its dealers had reason to fear a price cutting Potamkin franchise. The Potamkins had built a huge retail business by selling cars in high volume at small markup over the prices paid to various manufacturers.

justify the inference that BMW NA's conduct was therefore the result of a conspiracy. Even if a distributor, acting independently, gave inaccurate reasons for its decision not to award a franchise, whether because of a desire to avoid controversy or some other reason, its actions would not violate the antitrust laws absent a conspiracy. And *Monsanto* teaches us that such a conspiracy cannot be inferred from highly ambiguous evidence.

In my view, a rigorous application of the test set forth in *Monsanto* requires that we affirm the grant of summary judgment to BMW NA on the Potamkins' Sherman Act § 1 claim. The majority resists the application of such a stringent test. Nevertheless, to the extent that the burden on a section 1 antitrust plaintiff to produce evidence supporting an inference of concerted action is a significant one, this is so because of the standard set forth in *Monsanto*.

Finally, I would also affirm the district court's dismissal of the tortious interference with contract claim. Tortious interference with contract, or with prospective contract, requires intentional and improper conduct. Restatement (Second) of Torts §§ 766, 766B (1979). The only "intentional and improper" conduct charged by plaintiffs is in essence the antitrust conspiracy. Because I find that plaintiffs have not produced sufficient proof of such a conspiracy to avoid summary judgment on the antitrust claim, I conclude that they have also failed to demonstrate "intentional and improper" conduct on defendants' part to meet their burden on the contract claim. Therefore, I believe that the district court properly granted

summary judgment on the tortious interference claim.

Similarly, the Potamkins other claims rise and fall along with their antitrust claim. For this reason I would affirm the district court's decision to dismiss the claims for common-law conspiracy, violation of New York's Donnelly Act, and "unfair competition" under state law.

In sum, I join with the majority to affirm the district court's decision denying summary judgment on the Potamkins' claim under the Pennsylvania Board of Vehicles Act. However, as I would affirm the grant of summary judgment to BMW NA on the Potamkins' Sherman Act § 1 claim and the closely related tortious interference claim as well as the dismissal of the interwoven pendant state law antitrust and unfair competition claims, I respectfully dissent from the balance of the majority's opinion and judgment.

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

APPENDIX B — OPINION OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION

NO. 87-2258

[stamped]
FILED NOV 14 1990

[stamped]
ENTERED: 11-15-90

BIG APPLE BMW, INC., POTAMKIN BMW AND VW, INC., ROBERT POTAMKIN and ALAN POTAMKIN

v.

BMW OF NORTH AMERICA, INC.

MEMORANDUM AND ORDER

FULLAM, Sr. J. NOVEMBER 13, 1990

Plaintiffs sought unsuccessfully to become authorized BMW dealers in 1985, through the purchase of existing dealerships in New York City (Trans-Atlantic Motor Cars) and Philadelphia (the Irvin Green franchise). In each instance, the defendant BMW of North America, Inc. refused to approve transfer of the franchise, and plaintiffs have now brought this action for damages, asserting that the defendant violated the antitrust laws, violated a

Pennsylvania statute, and maliciously interfered with certain contracts or prospective contracts. Defendant now moves for summary judgment on all claims.

Discovery has been extensive and thorough, and the evidentiary record seems fully developed. The evidence must, of course, be viewed at this stage in a light most favorable to the plaintiffs.

I. Summary of Facts

The Potamkin family (father Victor, sons Robert and Alan), through various corporate entities and with various business associates, own and operate a large number of automobile dealerships, at various locations along the East Coast of the United States. Victor Potamkin — not a party to this litigation — has long operated a successful Cadillac dealership in New York City. In 1980, he wrote to the corporate headquarters of defendant's German parent, expressing an interest in acquiring a BMW franchise. Negotiations with defendant's American representatives ensued. Mr. Potamkin expressed a preference for a franchise in the Atlanta, Georgia or Miami, Florida area, but was told that the only opening then available was in Great Neck, Long Island. Mr. Potamkin was willing to accept that location, and the parties discussed and inspected various possible locations for the dealership. Although Mr. Potamkin's application received tentative, preliminary, approval at higher levels of the company, defendant's regional officials were of the view that Mr. Potamkin was not "suitable". His application was denied, and the defendant decided not to establish the additional dealership in Great Neck, Long Island. Mr. Potamkin was advised that the defendant intended to "work with [its] existing dealer body to improve the overall representation of BMW on the north shore of Long Island" (plaintiffs' Ex. 5).

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This incident does not give rise to any claim asserted in this litigation — Victor Potamkin is not a party, and the statute of limitations has expired — but plaintiffs advance this incident as evidence of a pattern of behavior, and as part of a continuing conspiracy between defendant and its dealers to exclude competition in violation of the antitrust laws.

The defendant had two franchisees in Manhattan. One of them, Trans-Atlantic Motor Cars, was up for sale, since its lease was about to be terminated. A Potamkin concern, plaintiff Big Apple BMW, Inc., had reached an agreement in principle with the owners of Trans-Atlantic to purchase the franchise for approximately $1 million. The defendant scuttled the sale by making clear that it would not accept plaintiff as a BMW dealer. Instead, the defendant purchased the franchise (for approximately $700,000) and closed the dealership. Plaintiff asserts that the defendant took this action pursuant to a conspiracy with the remaining Manhattan dealership, for the purpose of excluding competition in that area.

At about the same time, a representative of the defendant informed Robert Potamkin that the defendant was dissatisfied with the performance of one of its Philadelphia area dealers, Irvin Green, and suggested that perhaps Mr. Potamkin might acquire an interest in the franchise and improve its performance. In due course thereafter, in late 1985, Robert Potamkin entered into a written agreement to purchase the franchise from Irvin Green, and submitted a formal application to defendant for approval. Although the defendant went through the motions of giving careful consideration to the application, it had actually been decided at the very outset that the application would be denied. It is plaintiffs' contention that this rejection resulted from a conspiratorial agreement between defendant and its other BMW dealers to exclude the competitive threat posed by plaintiff — a large-volume, "discount" dealer.

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II. The Antitrust Claim

Defendant had the undeniable right to select its dealers, to determine its marketing strategy, and to exercise business judgment concerning the "image" of its products it wished to project, and how best to achieve that objective. The defendant cannot be held liable under the antitrust laws for rejecting the Potamkins' applications, whatever the reason or lack of reason, so long as the defendant was acting unilaterally. But if there was an agreement or understanding between the defendant and one or more other persons or firms to impair competition — for example by territorial restrictions, market-allocation, or price-fixing — defendant's conduct would be actionable.

There can be no doubt that the defendant did not wish to be associated with any of the Potamkins or their companies, and that at least one of the reasons for this attitude was the perception that plaintiffs would function as "discounters". From the defendant's perspective, plaintiffs' large volume, low margin, somewhat flamboyant image as automobile dealers was incompatible with the defendant's marketing strategy and the dignified image it sought to project; and plaintiffs would be unlikely to provide the high level of service after the sale which defendant insists upon. From the plaintiffs' perspective — which must be the court's perspective at this juncture — the defendant did not want its cars to be sold at prices substantially below those charged by other dealers and feared that the introduction of a Potamkin dealership would cause disruptions, and would make a lot of the other dealers unhappy. The narrow issue upon which decision turns is whether plaintiffs have enough evidence to get to a jury on the issue of concerted action.

In *Tunis Bros. Co. v. Ford Motor Co.*, 763 F.2d 1482 (3d Cir. 1985), *vacated on other grounds*, 475 U.S. 1105 (1986), *on*

remand, 823 F.2d 49 (3d Cir. 1987), *cert. denied*, 108 S. Ct. 1013 (1988), it was held that a jury could find concerted action in violation of the antitrust laws from evidence that a group of dealers met, agreed to oppose the grant of a proposed new franchise to plaintiff, and informed the defendant that, if plaintiff were granted a franchise, they would no longer cooperate with defendant in its marketing strategies. By yielding to these pressures from its other dealers, the defendant violated the antitrust laws and incurred liability to plaintiff.

In *Arnold Pontiac-GMC, Inc. v. General Motors Corp.*, 786 F.2d 564 (3d Cir. 1986), it was held that concerted action could be found on the basis of evidence of a sudden change in attitude following dealer complaints about a proposed new franchise, coupled with evidence that the defendant had a financial interest in one of the existing dealerships. The court held that this evidence tended to exclude the possibility that the defendant's denial of the franchise reflected a purely unilateral decision, and thus created a material issue of fact for the jury.

In the present case, plaintiffs contend that, notwithstanding the absence of any direct evidence to establish that other dealers were opposed to plaintiffs' applications, or that other dealers complained to defendant about plaintiffs' pending applications, or that defendant's denial of plaintiffs' applications were in response to dealer complaints, a rational jury could infer the requisite concerted action from the evidence as a whole. Plaintiffs point to 19 bits of evidence which, they argue, support such an inference:

1. *The letter rejecting Victor Potamkin's Great Neck application.* On November 4, 1981, Mr. Cronin, on behalf of the defendant, wrote a letter to Victor Potamkin which included the following:

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> "After much deliberation, we have decided that the appointment of a BMW dealer in Great Neck at this time would not be the proper long-range solution to our longstanding problem. In lieu of an appointment, *we have opted to work with our existing dealer body* to improve overall representation of BMW on the north shore of Long Island." (Emphasis supplied by plaintiffs.)

Plaintiffs argue that this letter constitutes an admission by the defendant that it was acting in concert with its other dealers in excluding Victor Potamkin from the market. I do not believe, however, that this letter can rationally be interpreted in that fashion. As plaintiffs acknowledge, the "longstanding problem" mentioned in the letter was the lack of adequate BMW sales coverage in the northern part of Long Island. Mr. Cronin and Mr. Potamkin had been discussing one possible solution, the establishment of an additional dealership in Great Neck. The letter merely states that the defendant had chosen another solution, better performance and greater coverage by the existing franchisees. The statement "We have opted to work with our existing dealer body to improve the overall representation of BMW on the north shore of Long Island" reflects nothing more than a unilateral decision by the defendant on a matter of marketing strategy.

2. *The affidavit of Harry Gray.* Harry Gray, a former BMW dealer on Long Island, attended a meeting of BMW dealers (a dealer advertising group, or "DAG") in 1980 or 1981. At that meeting, several dealers expressed concern over the possibility that Potamkin would be given a franchise in Great Neck; and "the dealers opposed BMW granting Victor Potamkin a BMW franchise". When he later learned that Mr. Cronin, the responsible

BMW official, had recommended against approving the Potamkin application, Mr. Gray concluded that Mr. Cronin was acting in response to the dealers' objections.

I assume that Mr. Gray's testimony at a trial would be consistent with his affidavit. This evidence would be competent to establish dealer opposition to the Potamkin application. It does not establish that the dealers conspired with each other to exclude Mr. Potamkin from the competitive landscape; it does not establish that the alleged opposition of the dealers was communicated to the defendant, or that the defendant acted in response to dealer complaints. Mr. Gray's opinion that there was a causal relationship between the dealers' opposition and Mr. Cronin's ultimate decision is, admittedly, based on nothing more than the fact that some dealers did express opposition at the meeting he attended, and that Mr. Cronin later recommended against Potamkin. That kind of unfounded speculation would not be admissible at trial, and does not prove anything.

3. The defendant did not differentiate among members of the Potamkin family, but treated all Potamkin enterprises as a single "group". This factor provides increased justification for viewing as relevant the entire course of events, but is not evidence of concerted action on the part of the defendant.

4 and 5. Michael Jackling, defendant's senior vice-president for operations, and Mr. Cronin, defendant's eastern regional manager, stated in 1985 that they did not wish to have the Potamkins as BMW dealers because they were "price discounters". This evidence does not, of course, show concerted action between defendant and its dealers. If anything, this evidence tends to support defendant's assertion that its decisions were unilaterally arrived at, in pursuit of its own marketing strategies.

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6. *Bruce Braverman's testimony about statements made by Don Mitchell.* Mr. Mitchell was the area sales representative for General Electric Capital Auto Lease, a division of General Electric Capital Corporation. His employer was co-owner, with the defendant, of BMW Credit and/or BMW Leasing. In the course of his duties, he called upon all BMW dealers in the area, as well as dealers of other makes of automobiles. In the course of his travels in late 1985, there were discussions with various BMW dealers concerning the proposed sale of the Irvin Green franchise to plaintiffs. When asked to identify particular dealers, he stated, "I couldn't tell you specifics. It could have been one, ten, it could have been all of them." He characterized the situation as "shop talk, street talk" concerning the proposed Potamkin acquisition.

Bruce Braverman was employed by plaintiffs as a leasing manager, in anticipation of the acquisition of the Green BMW franchise. He testified on deposition that, on January 16, 1986, Mr. Mitchell visited him at his place of business and made the following statement:

> "A. Don Mitchell told me that the BMW dealers in the area would not let Potamkin get the franchise because they were afraid that Potamkin's reputation of selling cars cheaper than everybody else was not something that they wanted to get involved with. They didn't want to be involved in price competition. They wanted to keep their price levels where they were and that they were going to do what they could to make sure that Potamkin did not get the franchise.
>
> "Q. Did Mr. Mitchell say anything else?

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"A. That was enough for me." (Braverman deposition pp. 91-2.)

Mr. Braverman immediately wrote a memorandum of the conversation. Mr. Mitchell denies having made the statement attributed to him by Mr. Braverman. Don Rosen, one of the Philadelphia-area BMW dealers who, according to Mr. Braverman, was identified by Mr. Mitchell as one of the dealers who had mentioned the Potamkin transaction to Mr. Mitchell, denies having had any such discussion with Mr. Mitchell or anyone else; indeed, he testified on deposition that he was not even aware that the Potamkins were negotiating for a BMW franchise.

As he was a relatively low-level employee of a corporate affiliate, whose job responsibilities were totally unrelated to selection of dealers, Mr. Mitchell's statements, even if made, are not binding upon the defendant. What he allegedly told Mr. Braverman is inadmissible hearsay, and cannot be considered for any purpose. It should be noted, however, that the alleged statement purports to reflect what the dealers intended to do, yet the statement was made some two weeks *after* the defendant had rejected the Potamkin application. Moreover, it would not, in any event, establish that the dealers' views were communicated to the defendant, and acquiesced in by the defendant.

7. *Defendant's alleged opposition to price advertising by its dealers.* There is evidence from which a jury could conclude that the defendant urged its dealers to use advertising which stressed the high quality of the product, and which did not discuss price.

8. *Dealers' cooperative efforts to enforce advertising standards.* The defendant's district sales manager, Marty Focht, testified on deposition that, within the past year or so, defendant

has received complaints from several dealers about the advertising practices of other dealers. There is, however, no evidence of concerted action. In any event, this evidence about events in 1988 does not tell us much about the 1985 rejection of plaintiffs' applications, and it can scarcely be suggested that these plaintiffs have been damaged by the defendant's advertising policies.

9. *Evidence that BMW dealers had a strong motive to exclude Potamkin.* This is undoubtedly correct, since Irvin Green was not selling as many cars as plaintiffs could have been expected to. By the same token, however, the dealers had equally strong motivation to oppose the sale of the Irvin Green franchise to any active and successful car dealer. But the sale of the Green franchise to Sloan went through without any obstacles, almost immediately after the Potamkin rejection.

10. *The testimony of Michael Vadasz.* Mr. Vadasz is the principal in Otto's Imports, a Philadelphia-area BMW dealer. At a cocktail party in 1986, Mr. Vadasz commented to Robert Potamkin that for many years the defendant had wished to establish an additional BMW franchise in the Jenkintown area. Vadasz stated that, in his opinion, virtually every automobile dealer, of all makes and models, is afraid that the appointment of a new dealership will take sales away from existing dealerships. Mr. Vadasz stated in deposition that his discussion with Robert Potamkin did not deal with the Potamkins or their possible appointment as a BMW dealer; and that he has never discussed these matters with other BMW dealers.

11. *Discussions of sales figures at dealer advertising group meetings.* BMW dealers meet periodically in "DAG" meetings. The sales performances of the various dealers are discussed, and a schedule of each dealer's sales of new cars by model, by total

volume of sales, and by percentages, is passed out and discussed.

12. *Groups of BMW dealers are organized into "Twenty-Group" clubs.* They meet periodically to discuss, among other things, each other's sales, profit margins, and other data compiled from financial statements, enabling them to compare their own sales and profit margins with those of other dealers.

13. Defendant monitors the average profit margin for all dealers in each region, and reports this to company headquarters on a monthly basis.

14. *Allocation of vehicles.* Before increasing a dealer's allocation of vehicles, defendant tries to assure itself that the dealer's profit margins are adequate. Plaintiffs view this as evidence of price-fixing; defendant points out that there is evidence of only a single instance in which this occurred, and that it reflected nothing more than legitimate concern over the financial viability of the dealer in question.

15. *The 1978 dealers' manual; consulting existing dealers about new applicants.* Plaintiffs' brief inadvertently mischaracterizes the evidence on this point. There is *no evidence* that existing BMW dealers are consulted by the defendant concerning proposed sales of existing franchises.

16. *Testimony of Ursomarso.* Mr. Robert Potamkin would testify that a Wilmington area dealer, Frank Ursomarso, admitted to him that the defendant had discussed with him, Ursomarso, the proposed Green-Potamkin transaction. This is, of course, inadmissible hearsay. Mr. Ursomarso himself testified only that, at a later date, he was asked if he knew Mr. Potamkin, and that he truthfully informed the defendant that he did not.

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17. *Evidence that defendant conferred with other New York metropolitan dealers "concerning plans for the New York market".* In 1984, plaintiff was considering the possibility of buying out its two existing Manhattan dealerships, and consolidating them into a single dealership owned and operated by defendant. Before proceeding with the project, the defendant discussed the proposal with various existing BMW dealers in the area.

18. *Evidence that defendant punished discounters by decreasing their allocations.* Defendant's CEO testified that, in considering whether to increase a dealer's allocation of cars, it would not be a valid basis for increasing the allocation if it appeared that the dealer in question was merely wholesaling vehicles to brokers in other parts of the country. Even if, as plaintiffs contend, this can be construed as punishing dealers who offer vehicles at discount prices, it reflects merely unilateral marketing policy on the part of the defendant.

19. *Defendant's aversion to the Potamkins.* Defendant's attitude towards the Potamkins is well documented in this record. In addition to opposing them as discounters and denigrating their sales methods and willingness to provide service, defendant has repeatedly asserted that Mr. Victor Potamkin once offered Mr. Cronin a substantial bribe (although the record is devoid of circumstantial corroboration, or documentation). Defendant's lack of sincerity in processing the Robert Potamkin application for the Irvin Green franchise can be viewed as reflecting hostility. And, in the course of this litigation, defendant took actions which can be interpreted as blatant attempts to blacken the reputations of all Potamkins and all Potamkin enterprises, without any basis in fact. Viewing these matters in a light most favorable to the plaintiffs, there is a supportable inference that defendant views plaintiffs as competitors, and has exhibited anti-competitive intent toward

them. But the antitrust laws are intended to protect competition, not competitors. The seeming animosity disclosed by the evidence is essentially irrelevant to the antitrust issues.

Having carefully considered all of the foregoing contentions, and the fully developed record, I am left with the reasonably firm conviction that, while the evidence does not rule out the possibility that the defendant's rejections of plaintiff's applications were the product of concerted action between defendant and one or more of its dealers, there is simply no proof of concerted action sufficient to withstand a motion for summary judgment. Plaintiffs' antitrust claims will therefore be dismissed.

III. The Pennsylvania Statute

The Pennsylvania Board of Vehicles Act, 63 Pa. Stat. Ann. § 818.1 *et seq.* provides:

> "It shall be a violation of this Act for any manufacturer, factory branch or distributor licensed under this Act to:
>
> "(3) unreasonably withhold consent to the sale, transfer, or exchange of the franchise to a qualified buyer capable of being licensed as a new vehicle dealer in this Commonwealth." 63 P.S. § 818.9(b) (3).

Contrary to defendant's argument, I conclude that these plaintiffs do have standing to sue under that statute, which contemplates litigation on behalf of "any person who is or may be injured by a violation of a provision of this Act *or* any party to a franchise who is so injured in his business or property by violation

of a provision of this Act relating to that franchise . . .".

Again, contrary to defendant's argument, plaintiffs are not required to establish a conspiracy between defendant and its dealers in order to prove that the defendant unreasonably refused to approve the Green-Potamkin transfer. And there are, obviously, numerous legitimate factual disputes as to whether the defendant did or did not act reasonably in rejecting the Potamkin application. Count II of plaintiffs' complaint will not be dismissed at this juncture.

V. Malicious Interference with Contract or Prospective Contractual Relations

Plaintiffs assert claims under Restatement Second Torts § 766 (interference with contractual relations) and § 766 (B) (interference with prospective contractual relations). But plaintiffs could not achieve an enforceable contract to buy the Transcontinental franchise in New York, or the Irvin Green franchise in Philadelphia, without defendant's approval. Defendant therefore had a privilege to interfere, for the protection of its own contractual rights. This count cannot withstand defendant's motion for summary judgment.

VI. Other State Law Claims

Since plaintiffs have failed to adduce evidence of a conspiracy, their common-law conspiracy claim must be dismissed.

Since plaintiffs' federal antitrust claims must be dismissed, their claims under New York's Donnelly Act must likewise be dismissed.

Finally, plaintiffs' claim for "unfair competition" under state law appears to be based entirely upon a theory of concerted action by defendant to suppress competition. As such, it cannot survive dismissal of the antitrust claims.

VII. Conclusion

Defendant's motion for summary judgment will be granted as to all claims except plaintiffs' claims under the Pennsylvania Board of Vehicles Act. An order to that effect follows.

Appendix B

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION

NO. 87-2258

BIG APPLE BMW, INC., POTAMKIN BMW AND VW, INC., ROBERT POTAMKIN and ALAN POTAMKIN

v.

BMW OF NORTH AMERICA, INC.

ORDER

AND NOW, this 13th day of November, 1990, upon consideration of defendant's motion for summary judgment and plaintiffs' response, it is ORDERED:

1. As to Count II of plaintiffs' complaint, the motion is DENIED.

2. In all other respects, the motion is GRANTED, and all counts of plaintiffs' complaint except Count II are DISMISSED WITH PREJUDICE.

s/ John P. Fullam
Sr. J.

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DENYING MOTION FOR REHEARING AND SUGGESTION OF REHEARING EN BANC

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 91-1339 & 91-1458

BIG APPLE BMW INC., et al.

vs.

BMW OF NORTH AMERICA, INC.

SUR PETITION FOR REHEARING

Present: BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, COWEN, NYGAARD, ALITO and ROTH, *Circuit Judges.*

The petition for rehearing filed by Appellee and Cross-Appellant in the above entitled case having been submitted to the judges who participated in the decision of this court and to all other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied. Judge Becker would have granted rehearing.

BY THE COURT,

Sep 2 1992

s/ Carol Los Mansmann
Circuit Judge

Supreme Court, U.S.
FILED
JAN 7 1993
OFFICE OF THE CLERK

No. 92-947

In the Supreme Court of the United States

OCTOBER TERM, 1992

BMW OF NORTH AMERICA, INC.,
Petitioner,

v.

BIG APPLE BMW, INC., POTAMKIN BMW AND VW, INC., ROBERT POTAMKIN and ALAN POTAMKIN,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Respondents[1] respectfully file this brief to set forth reasons why the petition for a writ of certiorari should not issue pursuant to Supreme Court Rule 10.

[1] Pursuant to Supreme Court Rule 29.1, respondent corporations state that they have no corporate parents or subsidiaries.

OPINION BELOW

The Court of Appeals' complete decision was filed under seal because it included information filed under seal in the district court. Accordingly, a redacted opinion has been published at 974 F.2d 1358 (3d Cir. 1992) and that same redacted opinion is the one furnished by BMW NA as Appendix A to its petition for certiorari. It omits certain text and footnotes contained in the full opinion, including matters germane to this petition. Respondents are therefore lodging with this Court in connection with this response the unredacted opinion, to which reference is made in this Brief.[2]

STATEMENT OF THE CASE

BMW NA sought and obtained summary judgment in the district court, which summary judgment the Court of Appeals vacated, remanding this case for further proceedings and trial.

As set forth in more detail below, BMW NA's petition for certiorari commits these errors: (1) it states record facts only in the light most favorable to BMW NA's own position, and ignores all disputed facts, contrary to the correct summary judgment standard; (2) it improperly characterizes as "triple hearsay" evidence which the Court of Appeals specifically determined to be non-hearsay and admissible evidence; (3) it attempts to manufacture a conflict among circuit court decisions concerning "pretexts" in Sherman Section One cases, which conflict does not exist; (4) it hypothesizes a conflict between the case at bar and *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752 (1984) and *Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717 (1988), where no such conflict exists. The Court of Appeals in the present case considered at length both *Monsanto* and *Sharp*, and correctly applied their holdings.

To briefly illustrate the second of these errors, BMW NA

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[2] Citations to that opinion in this brief are designated "L" (for "lodging") and the page number of the typescript opinion. Citations to BMW NA's appendix A opinion are designed "a," and citations to the record in the Court of Appeals are designated "A," following the convention in BMW NA's petition.

claimed in the district court that an admission of the existence of a conspiracy by an employee of BMW Credit and BMW Leasing (Don Mitchell) constituted "hearsay" and was thus inadmissible against BMW NA .[3] The Court of Appeals examined this matter at length, and disagreed with BMW NA's position, finding the statement admissible against BMW NA under both F.R.Evid. 801(d)(2)(D) and 801(d)(2)(E). L 34-40; 33a-38a. In making this determination, the Court of Appeals analyzed in detail the record evidence and applied F.R.Evid. 801(d)(2)(D) and 801 (d)(2)(E) to these facts of record. *Id.* BMW NA has not challenged or sought a writ of certiorari on this evidentiary ruling, and it must be accepted as correct and controlling on this record. Notwithstanding, BMW NA has continued to dismiss this item of evidence as "triple hearsay" (petition for writ of certiorari at pp. 8-9 and 10). But it is *not* hearsay at all: the Court of Appeals so ruled, which ruling BMW NA has not challenged in its petition.

The above example, writ large, characterizes the petition. In moving for summary judgment, BMW NA invok ed a standard whereby inferences must be construed against itself, and the record read in the light most favorable to plaintiffs, the opponents of BMW NA's motion. *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962). However, BMW NA has consistently ignored that standard in its petition. Each of the factual assertions it purports to make at pp. 4-12 reflects only BMW NA's version of disputed factual issues, and matters that the Court of Appeals clearly held were disputed issues of fact.

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[3] The testimony in question reads in pertinent part:

> A. Don Mitchell [of BMW Credit and Leasing] told me that the BMW dealers in the area would not let Potamkin get the franchise because they were afraid that Potamkin's reputation of selling cars cheaper than everybody else was not something that they wanted to get involved with. They didn't want to be involved in price competition. They wanted to keep their price levels where they were and that they were going to do what they could to make sure that Potamkin did not get the franchise.
>
> Q. Did Mr. Mitchell say anything else?
>
> A. That was enough for me.

A2195-96, 2312.

A. The Parties And Their Businesses

For example, in purporting to describe "the parties and their businesses" at pp. 4-5, BMW NA portrays a record in which BMW NA (and its existing dealers) have only unblemished, sterling reputations, and are striving to uphold only the highest possible business standards in the automobile industry, whereas, in polar contrast, plaintiffs' reputation is solely negative, and plaintiffs seeks to uphold no such standards. The inference BMW NA seeks to have this Court draw is that BMW NA's conduct at issue in the lawsuit must, therefore, have been justified by business reasons. Thus, BMW NA states that "[b]eginning in 1984, BMW NA . . . established rigorous minimum standards for the sales, service and parts operations of BMW dealers and continuously works with its dealers to ensure compliance with these standards." (Petition pp. 4-5).

BMW NA knows that the record in this case contains abundant evidence casting serious doubt on this contention, because BMW NA itself ignored, and many of its dealers openly flouted, the supposed standards with impunity: in the geographical area at issue in this lawsuit, for example, one "exclusive" BMW dealership sold used Toyotas from Hertz Rent-A-Car in its front sales area, A2145; repair space was sublet to non-BMW operations at another BMW dealership, A2115; one BMW dealer's parts accounts was seriously in arrears for long periods, A2147; another dealer refused to sign its dealer agreements and refused to purchase repair equipment which BMW claimed was essential to its operation, yet BMW continued to support this dealer, A2141; most BMW dealers did not segregate BMW parts departments from other manufacturer' parts departments, as they were theoretically supposed to do, A1909-14; many BMW dealers were located in "automobile rows," A2074, 2704-41, and so forth.

At the same time, the record contains unrefuted evidence that plaintiffs were willing, had the financial capability, and had stated the intention to BMW NA , to comply fully and completely with each and every BMW NA standard, including building brand new "stand alone" facilities dedicated solely to BMW cars. The Court of Appeals found that "an internal BMW NA document acknowledged that Robert [Potamkin] had promised

to meet all required BMW standards." L 49, 47a. As the Court of Appeals further found, "Robert [Potamkin] indicated that he had been willing to meet any BMW NA criteria, including renovations to his proposed facility, to meet standards required for a higher SPG, and had so informed Casella [of BMW NA]. A1708-09; A1719; A1999." L 55, 52a.[4] *Accord*, L 18; 18a (with respect to Long Island) "[BMW NA's] Cronin testified that the Potamkins envisioned this as an exclusively BMW franchise. . . ."

With respect to its denigrations of plaintiffs (certiorari petition p. 5), BMW NA further crosses the line. It states that plaintiffs have "a reputation marred by government investigations into . . . Potamkin business practices and service." (Petition at 5). However, the record citations given for these "government investigations" (A863-66, 972-1136) turn out to be an assurance of voluntary discontinuance in 1983 relating to a Cadillac and Toyota agency in New York concerning plaintiffs' father.[5] Since BMW NA has itself recently signed a consent decree with this very same New York attorney general for deceptive advertisements,[6] apparently BMW NA would also characterize itself as having "a reputation marred by government investigations." The point is, the record in this case shows that BMW NA's supposed scrutiny of plaintiffs' "government investigations" and "consumer complaints" was itself deliberately manipulated and skewed. As the Court of Appeals found:

> [T]here is no dispute that Robert [Potamkin]'s application was the first for which BMW NA hired a private investigator's services. A2288. Gay submitted his report directly to the Weil, Gotshal & Manges law firm and BMW NA decision-mak ers never received a copy

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[4] Similarly, existing BMW dealer Gladys Caulfield in Manhattan stated that she sought to sell her dealership to Potamkin because "it just made more sense . . . you know they had the wherewithal to really do a beautiful job and I thought that's what BMW was looking for. A1662-63." L 26; 26a.

[5] In contrast, BMW NA's contemporaneous 1985 investigation of plaintiffs in Pennsylvania, New Jersey, and Florida — locations where plaintiffs principally did business — demonstrated good credit ratings, approval by the Better Business Association, and the lack of any government investigations or actions. A974, 1087.

[6] *See Wall Street Journal*, December 11, 1992, page B9A, "New York State Finds Leasing Ads of BMW Deceptive."

> of it. A2164. Further, from the information provided to Gay at the outset of his investigation a jury could infer that BMW NA was culling prete xtual excuses to deny a Potamkin franchise. Gay testified that he was ordered to investigate consumer complaints, but not provided with favorable references furnished by Robert. A2292-98. Despite BMW NA's contention that applicant references are always favorable and therefore were considered less valuable for purposes of its investigation, Gay testified that in each subsequent investigation of a potential dealer, BMW NA furnished him with a copy of the application and he checked positive as well as negative sources.
>
> Moreover, BMW NA's thorough investigation into the Potamkins' business practices appears pretextual given its lack of interest in similarly investigating other prospective and existing dealers. For example, although Gay was asked to investigate all consumer complaints against the Potamkins, a 1981 lawsuit brought by the Pennsylvania Attorney General against several Toyota dealerships, who also owned BMW franchises, attracted no attention from BMW NA . One BMW dealer who entered into an "assurance of voluntary compliance" with the state Attorney General's Office testified that he did not receive an inquiry from BMW NA . A2040-41.

L 48-49 n. 14; 46a-47a, n. 14.

At footnote 2 p. 5, BMW NA states that its dealers participate in BMW D AG (Dealer Advertising Group) meetings and "the record is undisputed that the only thing discussed at BMW DAG meetings is advertising strategy, not price." This statement is curious, as the Court of Appeals specifically found, and the record clearly shows, that BMW dealers compare each other's sales statistics with one another at these meetings. A2742-44 and L 20.

BMW NA finally claims that "the P otamkin's organization advertising philosophy is that of a bargain basement, employing many distressed-sale items." The record shows: (a) that Potamkins advertising was similar to advertising by BMW dealers

on their other makes of cars that competed with Potamkin, (b) a dealer (Ciasulli) approved by BMW at the same time Potamkin was rejected employed advertising similar to that used by Potamkin. *Compare* e.g. A1137 (Potamkin) with A2307-08 (Ciasulli).

B. The Events at Issue

At pages 5-9 of its petition, BMW NA seeks to summarize the record evidence, but again does so in a highly selective, one-sided and misleading fashion. The Court of Appeals presented a comprehensive analysis of these same facts (see Appendix A at pp. 17a-54a and L 17-58) to which reference is respectfully made. To restate those would expand this brief by many pages.

However, correction of BMW NA's misstatements may be briefly made with reference to that decision and to the record. At pp. 5-6, BMW NA states with respect to Long Island that discussions were only "preliminary." However, the record contains evidence directly contradicting this statement. A645.[7] The Court of Appeals analyzed this evidence in detail at L 17-19; 17a-19a, and concluded that the record showed far more than "preliminary discussions."

The Court of Appeals also found significant, probative evidence that existing BMW dealers brought concerted pressure upon BMW NA to deny Potamkin the franchise because Potamkin would, as one dealer put it, "alter the competitive landscape," meaning that dealers would be forced to engage in price competition with each other, which would ultimately benefit consumers. L 19-20; 19a-20a. BMW NA changed its course of conduct from approval of Potamkin to disapproval as a result of this concerted dealer pressure. *Id.* The Court of Appeals summarized this evidence by concluding:

> Given this sequence of events, a reasonable jury could infer that BMW NA would have welcomed a 'high volume' dealer such as Victor [Potamkin] and after succumbing

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[7] The deposition testimony reads: "We [Potamkin] were under the impression everything we wrapped up, we were appointed. We shook hands. He [Cronin, BMW NA regional officer] told us to go out and get the real estate. And that was it." A645.

> to pressure from its New York area dealers, entertained the prospect of installing a Potamkin dealership in an alternative location, Philadelphia. L 26, 25a.

With respect to that Philadelphia location, the existing BMW dealers again coalesced against plaintiffs because, as the admissible evidence reveals, the dealers "didn't want to be involved in price competition. They wanted to keep their price levels where they were and were going to do what they could to make sure Potamkin did not get the franchise." A2195-96, L 34; 33a. BMW NA at pp. 6-7 seeks to proffer a series of "business justifications" as to why Potamkin was not approved: supposed "poor reputation" (p. 7); supposed "outright refusal to sign the required form" (p. 7); supposed "adamant demand for assurances that they would receive hundreds of additional cars" (p. 7); supposed incompatible image with BMW (p. 7); supposed "uncooperative and confrontational" behavior (p. 7).

However, the Court of Appeals examined each of these in detail, and found, at a minimum, that they were disputed issues of fact or that there was no *substance* to any of BMW's purported justifications. L 32, 42-57; 39a-55a. The Court of Appeals concluded :

> [A]lthough a jury may credit BMW NA's reasons, we cannot conclude that a reasonable jury would disbelieve the Potamkins' substantial rebuttal evidence. L 41-42, 39a-40a.

The Court of Appeals first determined that evidence of concerted action was admissible and probative, (L 17-40; 16a-38a), and only thereafter examined BMW NA's supposed "independent reasons," finding there was substantial evidence casting doubt about their *bona fides* (L 41-57; 39a-55a).

REASONS WHY THE WRIT OF CERTIORARI SHOULD NOT ISSUE

I. There Is No Conflict As To How Evidence Of Pretextual Behavior By The Manufacturer Should Be Considered In A Sherman Section One Case

BMW NA's first reason for requesting certiorari (petition at pp. 14-23) is that the Court of Appeals in this case somehow

erred in its consideration of evidence of "pretext" by the manufacturer, BMW NA. It asserts this argument in various forms: that there is a supposed "conflict among the circuits" as to how pretexts should be considered in Sherman Section 1 cases (pp. 14-18); that the decision in the case at bar supposedly conflicts with *Monsanto*, *supra*, and *United States v. Colgate & Co.*, 250 U.S. 300 (1919) (pp. 19-23); that "competing inferences" can be drawn from "evidence of pretext" (p. 20); that "pretextual evidence" cannot be relied upon as "proof of conspiracy" (p. 21); and that the decision in this case "subverts the principles of summary judgment" (pp. 22-23).

Underlying all of BMW NA's arguments is a fallacious view of how evidence of "pretext" was viewed by the Court of Appeals in this case. BMW NA misstates that matter, claiming that the Court of Appeals substituted evidence of "pretext" by BMW NA for evidence of "concerted action":

> Contrary to the rulings of several courts of appeals, the Third Circuit concluded that evidence of pretextual reasons, in and of itself, qualified as evidence of concerted action.

Petition at 11. That is incorrect. The Court of Appeals in this case engaged in a careful, analytically rigorous analysis of the evidence of concerted action (L 17-40; 16a-38a), including evidence of the concerted pressure which BMW dealers organized and exerted upon BMW NA, and BMW NA's shift in its course of conduct as a result of this pressure. The court concluded that there "was sufficient evidence from which a reasonable jury could find concerted action in violation of section one of the Sherman Act" (L 40; 38a). BMW NA has not sought review of that determination or the evidentiary rulings upon which it is based.

The Court of Appeals then went on to consider the supposed "independent business justifications" which BMW NA had proffered, which BMW NA asserted were the "real reasons" for its conduct. The Court of Appeals extensively considered each of those supposed independent reasons (L 41-57; 39a-55a), and found there to be substantial evidence by plaintiffs that each and every reason was "pretextual," or not truthful. The Court of Appeals did not "substitute" evidence of "pretext"

for evidence of "concerted action," as BMW NA incorrectly claims. This is apparent from the structure of the opinion itself.

The Court of Appeals found that plaintiffs presented (1) admissible evidence of concerted action; *and* (2) evidence that tended to exclude the "independent justifications" asserted by BMW NA . Plaintiffs made both evidentiary showings.

With respect to the proof that BMW NA's stated business justifications were pretextual, plaintiffs, through discovery, examined each and every "independent business reason" which BMW NA put forth for rejecting the plaintiffs as dealers. Plaintiffs were able to show that BMW NA's reasons were untruthful, inaccurate, and just plain pretextual. Plaintiffs' proof of pretext is certainly relevant, probative and admissible under *Monsanto* as helping to "tend to exclude the possibility that the manufacturer . . . was acting independently." 465 U.S. at 764. It is not a substitute for evidence of concerted action. Plaintiffs did not so contend, and the Court of Appeals did not so hold.

Finally, BMW NA claims there is a "conflict among the circuits" on this issue of how evidence of pretexts should be treated. Ironically, BMW NA claims that three court of appeals decisions that preceded *Monsanto* correctly anticipated and applied *Monsanto*.[8] Petition for certiorari at 15. In contrast, the two courts of appeals which had the benefit of *Monsanto* (the court below in this case and the Ninth Circuit in *Dimidowich v. Bell & Howell*, 803 F.2d 1473, 1480 (9th Cir. 1986) *modified* 810 F.2d 1517 (9th Cir. 1987) supposedly failed to apply its teachings. Petition at 15.

Analytically, this is farfetched.[9] BMW NA has simply created a "straw man" in its effort to manufacture a conflict to

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[8] Those decisions are by the First Circuit in *Bruce Drug, Inc. v. Hollister, Inc.*, 688 F.2d 853, 857 (1st Cir. 1982); by the Second Circuit in *H.L. Moore Drug Exchange v. Eli Lilly & Co.*, 662 F.2d 935 (2d Cir. 1981), *cert. den.*, 459 U.S. 880 (1982); and by the Seventh Circuit in *Lamb's Patio Theatre, Inc. v. Universal Film Exchange, Inc.*, 582 F.2d 1068 (7th Cir. 1978). Petition for certiorari at 15.

[9] Indeed, the *Dimidowich* decision was not even decided under federal law; it was a diversity case that applied California state law. 803 F.2d at 1477 and note 1. In any event, it is not inconsistent with any of the other decisions cited.

satisfy Supreme Court Rule 10.1(a). Neither *Bruce Drug*, nor *H.L. Moore*, nor *Lamb's Patio* are inconsistent with the case at bar. *Bruce Drug* held there was *no* evidence of concerted action in the record, and that a supposed business pretext (which the court of appeals did not find to be pretextual in any event) did not prove a conspiracy. 688 F.2d at 857. That holding is consistent with: (a) *Monsanto*; (b) the case at bar; and (c) common sense. *H.L. Moore* and *Lamb's Patio* are to the same effect, both holding that a pretextual reason is not, *in and of itself*, proof of conspiracy. 662 F.2d at 943 and 582 F.2d at 1070.

It is clear that BMW NA has simply mischaracterized the decision and reasoning of the Court of Appeals in this case, in an attempt to generate a "conflict" with the above decisions where none exists.

For the above reasons, BMW NA's first ground for seeking a writ of certiorari must fail.

II. The Court Below Correctly Followed Sharp and Monsanto

It is difficult to apprehend exactly what BMW NA is claiming as its second ground for certiorari. To the extent BMW NA appears to assert that this Court requires some special, or incremental, burden of proof in price fixing cases, this Court ruled to the contrary last term in *Eastman Kodak Co. v. Image Technical Services*, 60 U.S.L.W. 4465, 4470 (June 8, 1992):

> The Court's requirement in *Matsushita* that the plaintiffs' claims make economic sense did not introduce a special burden on plaintiffs facing summary judgment in antitrust cases. The Court did not hold if the moving party enunciates *any* economic theory supporting its behavior, regardless of its accuracy in reflecting the actual market, it is entitled to summary judgment. *Matsushita* demands only that the nonmoving party's inferences be reasonable in order to reach the jury, a requirement that was not invented, but merely articulated, in that decision. If the plaintiffs' theory is economically senseless, no reasonable jury could find in its favor, and summary judgment should be granted.

BMW NA does not (and could not) argue that plaintiffs' theory in this case is "economically senseless." To the contrary, as the Court of Appeals recognized, this case has both "horizontal" and "vertical" components, because the essence of the case is concerted action by blocs or groups of existing BMW dealers to pressure BMW NA not to approve the Potamkin dealerships, so that the existing dealers could preserve their price levels and hence their profit margins. The admissible evidence of record shows that the existing BMW dealers did not want to "alter the competitive landscape," (20a), as they feared Potamkin would have done, and collectively pressured BMW NA to change its course, and to disapprove the Potamkin dealership, which BMW NA did. The admissible evidence of record also shows that the existing BMW dealers wanted to "avoid price competition," (33a), and to "keep their price levels where they were," (33a), and collectively pressured BMW NA to that end. As Mr. Mitchell of BMW NA Leasing and Credit admitted:

> [The dealers] would not let Potamkin get the franchise because they were afraid that Potamkin's reputation of selling cars cheaper than everybody else was not something that they wanted to get involved with. *They didn't want to be involved in price competition. They wanted to keep their price levels where they were and that they were going to do what they could to make sure that Potamkin did not get the franchise.* 33a.

Under *Matsushita* and *Kodak*, plaintiffs' case "makes sense," and BMW NA does not contend otherwise. Similarly, the record evidence in this case supports the conclusion that the ultimate consumers would have benefitted from the competition Potamkin would have introduced, and that the retail consuming public lost the benefit of that competition. This Court has repeatedly stressed that the ultimate focus of the antitrust laws is to promote maximum competition for the benefit of consumers. "Congress designed the Sherman Act as a consumer welfare prescription." *Reiter v. Sonotone Corp.*, 442 U.S. 330, 343 (1979).

BMW NA appears alternatively to contend that the record evidence consists only of the following two items: "BMW NA representatives and dealers share and discuss price statistics" and "BMW dealers set their collective advertising budget con-

tributions at a certain amount per BMW car sold." (Petition at 24). That does not describe the record in this case, as the Court of Appeals' decision makes clear.

To the extent that BMW NA alternatively contends that the decision by the court below is incompatible with *Monsanto*, that erroneous contention has been addressed in Point I above. The court below carefully considered and applied *Monsanto*. 13a-15a. To the extent BMW NA is contending that the decision of the court below is incompatible with *Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717 (1988), that is equally erroneous. The court below carefully considered the *Sharp* decision, and correctly applied it to the facts of record. 44-45a, L 46-47. As the court below stated:

> BMW NA misapprehends the legal parameter. In *Sharp*, the Court held that "a vertical restraint is not illegal *per se* unless it includes some agreement on price or price levels." Ruling after a trial in which the jury was instructed only on a *per se* theory of liability, the Court remanded the case for a new trial holding that *per se* illegality would not attach to a vertical non-price restraint and that "an agreement between a manufacturer and a dealer to terminate a 'price cutter,' without a further agreement on the price or price levels to be charged by the remaining dealer," must be judged under a rule of reason test. 485 U.S. at 726, 736. Thus, even if this case is on all fours with *Sharp*, the Potamkins may still proceed to a jury trial under the rule of reason test.
>
> Moreover, this case has an additional horizontal component that *Sharp* lacked. In *Sharp*, a single dealer, Hartwell, pressured Sharp to terminate Business Electronics. Here the Potamkins pled in their complaint, and the evidence suggests, that a *number* of BMW dealers combined to form a group boycott to pressure BMW NA to reject Potamkin competition. The Potamkins assert that all of BMW NA's alleged reasons for rejecting them are pretextual and that until BMW dealers voiced their strenuous opposition to Potamkin competition, BMW NA had acknowledged the value of installing Potamkins as

> dealers. Thus the Potamkins present a horizontal boycott case, rather than the non-price vertical restraint suggested by BMW NA. As we fully evaluate *infra*, the evidence of record, when viewed in the light most favorable to the Potamkins, supports their proposition.
>
> *Sharp* suggests that the proper distinction between a horizontal and a vertical restraint lies in determining which kind of an arrangement produces the restraint rather than analyzing its anticompetitive effects. *Sharp*, 485 U.S. at 730 n. 4. Under either analysis, however, when viewed in the light most favorable to the Potamkins, the evidence suggests that BMW NA rejected the P otamkins as a result of dealer opposition to price competition.

L 46-47, 44a-45a (footnote omitted). The record in this case fully supports those statements.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be denied.

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